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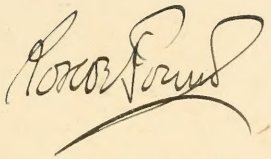

CASES ON EQUITY JURISDICTION

IN TWO VOLUMES

EDITED WITH SUNDRY NOTES AND REFERENCES

BY

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Not of the letter, but of the spirit: for the letter killeth, but the spirit giveth life. 2 Cor. 2:6.

VOLUME I.

NEW YORK
BAKER, VOORHIS & COMPANY
1906

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TO

GEORGE W. KIRCHWEY

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PREFACE

The present collection is meant to be a first book in equity. It is, therefore, an introduction and a guide, and as such deals with fundamental and underlying principles. It is believed that there is a place for such a work, and that a thorough familiarity with the essentials of the subject should precede the detailed study of the various topics of equity jurisprudence.

For this reason the first four hundred pages of the work deal with the origin, the nature, the extent and limitations of equity, the inter-relation of law and equity, and the principles and maxims controlling the administration of equity. The cases selected for this part of the work do not merely illustrate: they develop the doctrine, and it is believed that a careful study of the various cases composing this part will prepare the student to cross the threshold and examine in detail with fulness of knowledge the various phases of the subject.

It may be a source of surprise to some, and provoke not a little criticism, that the maxims should be treated in a work of this kind, for a maxim is supposed to be so general in its nature as to be inapplicable to a specific state of facts. That is perhaps true in common law where the maxims are wholly artificial: it is not true in equity where the maxims are natural, fundamental, and express in a happy form the compressed wisdom of centuries. If the maxim be not a truth in and for itself it nevertheless points the way to truth. It was therefore thought that a collection of cases developing the underlying principles, eventually crystalized into a maxim, would be a genuine service to the student. Should this view be unjustified it is a simple matter to skip this portion of the book.

In some instances the cases within a section are arranged logically; in others chronologically, as seemed best to suit the purpose in hand. The old cases have been constantly consulted, following in this respect the advice of my Lord Coke: "That in reading of these or any new reports, he neglect not in any case the reading of the old books of years reported in former ages, for assuredly out of the old fields must spring and grow the new corn."

Even a casual examination of the book must disclose the fact that a constant and serious effort has been made to select leading cases, and of these leading cases to select those decided by judges whose names add an additional weight to the authority of the case. Law is not a craft: it is a profession, and its history is both ancient and honorable. It is felt that association with the illustrious names in equity may call the student's attention to the traditions of the profession. The names of Nottingham, North, Macclesfield, Hardwicke, Thurlow, Eldon, Cottenham, Westbury, Cairns, Sir William Page Wood (Lord Hatherley), among the chancellors; Sir Joseph Jekyll, Sir William Grant, Lord Langdale, and Sir George Jessel among the Masters of the Rolls, and the Chancellor of Ireland, Lord Redesdale, should thus become familiar to the student.

In our own country the decisions of Chancellor Desaussure and of Chancellor Kent have been freely drawn upon. Indeed the collection may seem at times to be based in large part upon the masterly, learned and profound decisions of Chancellor Kent.

The Editor is deeply indebted to Mr. Joshua R. Clark, Jr., Assistant Solicitor for the Department of State, for constant assistance in the selection and annotation of cases; to Christopher B. Wyatt, Esquire, of the New York Bar, who rendered a similar service in the preparation of the Editor's cases on Quasi-Contracts; and to Professor William C. Dennis, Assistant Solicitor for the Department of State. There is likewise due a grateful acknowledgment of library courtesies extended by Professor George W. Kirchwey of Columbia University, and Dr. George Winfield Scott, Custodian of the Law Library of Congress.

The publishers placed Judge Keener's elaborate collection of cases at the disposal of the Editor, and while the present collection is independent as regards classification, arrangement and selection, Judge Keener's three volumes have been freely laid under contribution.

It is perhaps proper to add that a collection of cases on Equity Pleading will be published shortly. This volume will be separate and distinct, but may be used, it is hoped, in connection with the present collection.

Recalling the advice of Lord Coke that the old books of the law be not neglected, the Editor appropriates the concluding remarks of an apt address to "the gentle reader" prefixed to Sir Thomas Ireland's Abridgement of Dyer's Reports:

"You have been lately pleased to accept of a former peece of his,

which imboldeneth me to present you with this further fruit of his labors in the like nature, for the generall good of the Common-wealth. If any errors have passed the Presse, blame the Printers; I humbly conceive I have more reason to be sorry for that than yourself."

And, finally, should any fellow-worker in the fields of Equity stand aghast at the crowd of familiar faces that rush upon him as he turns the pages of the present collection, he is referred to the lines of Mr. Rudyard Kipling that so deftly disclose the wiles of casebook making:

When 'Omer smote 'is bloomin' lyre,
He'd 'eard men sing by land an' sea;
An' what he thought 'e might require,
'E went an' took—the same as me!

The market-girls an' fishermen,
The shepherds an' the sailors, too,
They 'eard old songs turn up again,
But kep' it quiet—same as you!

They knew 'e stole; 'e knew they knowed.
They didn't tell, nor make a fuss,
But winked at 'Omer down the road,
An' 'e winked back—the same as us!

Thus does the spirit of Poesy illumine, for one brief moment, law and equity.

JAMES BROWN SCOTT.

September 1, 1906.

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CASES ON EQUITY JURISDICTION

PART I.

ORIGIN, NATURE, EXTENT, AND LIMITATIONS OF EQUITY JURISDICTION.[1]

CHAPTER I.

ORIGIN, GROWTH, AND DEVELOPMENT OF EQUITY JURISDICTION.

What is Equity?

Equity is that system of justice which was administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction.

This definition is rather suggestive than precise; and invites inquiry rather than answers it. But this must necessarily be so. Equity, in its technical and scientific legal sense, means neither natural justice nor even all that portion of natural justice which is susceptible of being judicially enforced. It has, when employed in the language of English law, a precise, definite and limited signification, and is used to denote a system of justice which was administered in a particular court—the nature and extent of which system cannot be defined in a single sentence, but can be understood and explained only by studying the history of that court, and the principles upon which it acts. In order to begin to understand what equity is, it is necessary to understand what the English High Court of Chancery was, and how it came to exercise what is known as its extraordinary jurisdiction. Every true definition of equity must, therefore, be, to a greater or less extent, a history.—*Bispham, Principles of Equity, (7th ed.), C.* 1.

"By Juridical Equity is meant a systematic appeal for relief from a cramped administration of defective laws to the disciplined conscience of a competent magistrate, applying to the special circumstances of defined and limited classes of civil cases the principles of natural justice, controlled in a measure as well by considerations of public policy as by established precedent, and by positive provisions of law."—*Phelps, Juridical Equity* § 143.

In the Doctor and Student (Dial. 1, chap. 16), equity is thus described: "In some cases it is necessary to leave the words of the law, and to follow what reason and justice requireth, and to that intent equity is ordained; that is to say, *to temper and mitigate the rigor of the law.* * * * And so it appeareth that equity taketh not away the very right, but only that that seemeth not to be right by the general words of the law. * * * Equity is

[1]Lack of space has made it necessary to omit from these extracts the various citations made by the different authors. The serious minded student may easily obtain them by referring to the original works.

righteousness that considereth all the particular circumstances of the deed, which is also tempered with the sweetness of mercy." In Grounds and Rudiments (pp. 5, 6) it is said: "As *summum jus summa est injuria* since it cannot consider circumstances, and as equity takes in all the circumstances of the case, and judges of the whole matter according to good conscience, this shows both the use and excellency of equity above any prescribed law. * * * Equity is that which is commonly called equal, just, and good, and is a *mitigation and moderation of the common law* in some circumstances, either of the matter, person, or time; and often it dispenseth with the law itself. * * * The matters of which equity holdeth cognizance in its absolute power are such as are not remediable at law; and of them the sorts may be said to be as infinite almost as the different affairs conversant in human life. * * * Equity is so extensive and various that every particular case in equity may be truly said to stand upon its own particular circumstances; and therefore, under favor, I apprehend precedents not of that great use in equity as some would contend, but that equity thereby may possibly be made too much a science for good conscience." In Finch's Law (p. 20) it is said: "The nature of equity is to amplify, enlarge, and add to the letter of the law"; and in the treatise called Eunomus (Dial. 3 § 60) it was called "the power of moderating the *summum jus*." Lord Bacon adds the weight of his authority to this view, saying in one place: "Habent similiter Curiæ Prætoriæ potestatem tam subveniendi contra rigorem legis, quam supplendi defectum legis" (the court of chancery in like manner has the power as well of relieving against the rigor of the law as of supplying its defects); and in another: "Chancery is ordained to supply the law, and not to subvert the law." Lord Kames states the same theory without any limitation (Kames's Eq., Introd., pp. 12, 15): "It appears now clearly that a court of equity commences at the limits of the common law and enforces benevolence where the law of nature makes it our duty. And thus a court of equity, accompanying the law of nature in its general refinements, enforces every natural duty that is not provided for at the common law. * * * A court of equity boldly undertakes to correct or mitigate the rigor, and what in a proper sense may be termed the injustice of the common law." In the well-known treatise called Fanblanque on Equity, the author says (b. 1, chap. 1, § 3): "So there will be a necessity of having recourse to natural principles, that what is wanting to the finite may be supplied out of that which is infinite. And this is properly what is called equity, in opposition to strict law. * * * And thus in chancery every particular case stands upon its own particular circumstances; and although the common law will not decree against the general rule of law, yet chancery doth, so as the example introduce not a general mischief. Every matter, therefore, that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief here. For no man can be obliged to anything contrary to the law of nature; and indeed, no man in his senses can be presumed willing to oblige another to it. But if the law hath determined a matter with all its circumstances, equity cannot intermeddle." The same large view of equity has sometimes been taken by the earlier judges, but not to any considerable extent since the Reformation. The following example will suffice: In Dudley v. Dudley, Prec. Ch. 241, 244, Sir John Trevor, M. R., said: "Now, equity is no part of the law, but a moral virtue which qualifies, moderates, and reforms the rigor, hardness, and edge of the law, and is a universal truth. It does also

assist the law where it is defective and weak in the constitution, which is the life of the law; and defends the law from crafty evasions, delusions, and new subtleties invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless. And this is the office of equity, to protect and support the common law from shifts and contrivances against the justice of the law. Equity, therefore, does not destroy the law, nor create it, but assists it." I shall end these citations by a quotation from Chancellor D'Aguesseau, the great French jurist (Œuvres, vol. 1, p. 138) : " Premier objet du legislateur, dépositaire de son esprit, compagne inseperable de la loi, l'équité ne peut jamais être contraire à la loi même. Tout ce que blesse cette équité, veritable source de toutes les lois, ne resiste pas moins à la justice."—*Pomeroy, Equity Jurisprudence, (3rd ed.) vol.* 1, *p* 48, note.

Equity in the Common Law Courts.

We have seen that the Common Law was founded on certain fixed principles, and that it was only by set forms of procedure that rights could be enforced and secured, or civil injuries redressed.

It has always been held by the great oracles of the law that the principles of the Common Law are founded on reason and equity; and so long as the Common Law was in the course of formation, and therefore continued to be a *lex non scripta*, it was capable—as indeed it has ever continued to be, to some extent—of not only being extended to cases not expressly provided for but which were within the spirit of the existing law, but also of having the principles of equity applied to it by the judges in their decisions, as circumstances arose which called for the application of such principles. This was more especially open to the judges as regards defences to actions which were not founded on writs, and were therefore under their own control. But in course of time, a series of precedents was established by the decisions, or *responsa*, as Bracton calls them, of the judges, which were considered as of almost equally binding authority on succeeding judges as were the acts of the legislature; and it became difficult to make new precedents without interfering with those which had already been established. Hence (though new precedents have ever continued to be made) the Common Law became, to a great extent, a *lex scripta*, positive and inflexible; so that the rule of justice could not accommodate itself to every case according to the exigency of right and justice.—*Spence, Equitable Jurisdiction of The Court of Chancery, vol.* 1, *Part* 2, *B.* 1, *C.* 1, *pp.* 321—322.

The Chancellor.

Before dealing in detail with the reference of petitions to the Chancellor, which led to the conferment upon him of an extraordinary jurisdiction analogous to that of the King, Council and Parliament, it will be convenient to consider shortly the position of the Chancellor in and before the reign of Edward III. His office as the King's Secretary, Chaplain of his Chapel, and Keeper of his Seal was a very ancient office. Coke declares that it had existed from extreme antiquity, and it certainly existed before the Conquest. By reason of his position as custodian of the Great Seal he was the head of the office in which the King's Charters were inrolled, and whence the original writs were issued, in the manner already described. All the petitions to Parliament and the Council passed through this office, and the records concerning them

were there inrolled, and, where relief was granted upon them, as for instance that the judges should proceed with an action, it was usually carried into effect by a writ close out of the Chancery. From the time Becket held the office it became of importance and dignity next after that of the Justiciar only. William Fitz Stephen, one of Becket's Clerks, describes the Chancellor as sealing all the King's ordinances and being present, even though unsummoned, at all his councils. Nothing was done without the Chancellor's consent and advice either in the Curia or in the Exchequer. It does not appear that he regularly held any court of his own before the reign of Edward II., and the antiquity assigned by Coke and Blackstone to his Common Law jurisdiction is far too great. Fleta, writing in the reign of Edward I., merely refers to his control over the issue of writs, and says nothing of his holding any Court. He does say, however, that recognizances and contracts were inrolled in the Chancery, and judicial writs issued to the Sheriffs to enforce them out of the Chancery, just as by the judges themselves. If the recognizance were newly enrolled, when the creditor came to complain of the non-observance of the agreement, immediate execution issued, but if it were not, the debtor was summoned on a certain day to show cause why execution should not be had, and if he appeared and said nothing in point, or failed to appear, the writ to the Sheriff issued. "Ex hac quidem constitutione," adds the writer, "oriuntur brevia judicialia in cancellaria sicut coram ipsis justiciariis." The Statute of Merchants 13 Edward I. which created the Statute Staple, expressly reserved the power of the Chancellor and Justices to take recognizances in form by law, usage and manner provided. Perhaps in these inquiries may be found the first beginning of the Chancellor's separate jurisdiction. It is clear that by the date now considered the Chancellor was looked upon as a judicial personage. Becket, Chancellor under Henry II., was panegyrised as "qui regni leges cancellat iniquas, et mandata pii principis æqua facit," and Neville, Chancellor under Henry III., is referred to as "singulis sua jura, præcipue pauperibus, juste reddens et indilite." He was too, as we have seen, the President of the Council, which was greatly occupied with judicial work, and since the fall of Hubert de Burgh and the abolition of the Justiciarship, he was in fact 'head of the law' in the kingdom. So important had his office become that, from the reign of Henry III. onwards, continual demands were made that he should be elected by the Council or Parliament, or with their assent. He had indeed already become, what Bacon's Selden calls him, 'the kingdom's darling.' The Statute 28 Edward I. c. 5 expressly associates the Chancellor with the Judges and directs him and them to follow the King, "so that he may have at all times near him some sages in law which be able duly to order all such matters as shall come into the Court at all times when need shall require."

It is not then surprising that when the King or the Council appointed a delegate or commission to hear and decide petitions, the Chancellor should have been almost invariably chosen, with or without assistants, marked out as he was for such duties, not only by his connection with the administration of the law, with the King's grants and mandates under seal, and with the presentation and recording of the petitions, but also by his position as a great cleric, and, in most cases, the head of the chief Ecclesiastical Court in the kingdom, for such he usually was, since by reason of that position he could lay special claim to a knowledge of what 'conscience,' 'right,' 'justice,' 'honesty' or 'law and reason,'—the terms employed in the references to him—demanded.—*Kerly, History of Equity, C. II.*

Growth and Development of Chancery.

The permanent Council under the early Norman Kings consisted of the great officers of state,—the Chancellor, the great Justiciary, the Lord Treasurer, the Lord Steward, the Chamberlain, the Earl Marshal, the Constable, and any other persons whom the King chose to appoint; and of the two Archbishops, who claimed a right to form a part of every Council, public or private. Besides these were present, at times, the Comptroller of the Household, the Chancellor of the Exchequer, the Judges, the King's Serjeant, &c. This body was the 'Aula Regia,' or 'Curia Regis,' a Court which has been described in various and at first sight contradictory terms. Thus it has been called the highest Law Court, the Ministry of the King, a Legislative Assembly, &c. The apparent inconsistency of these descriptions vanishes on closer inspection, and throws great light on mediæval history. For the 'Curia Regis' possessed every attribute which has been ascribed to it. It was the executive. It was also a Law Court. It certainly took part in acts of legislation. Still, at the time of its existence it was no anomaly, since to the men of the eleventh century, not the combination but the severance of judicial and executive powers would have appeared anomalous. The 'Aula Regia' was in fact neither more nor less than the Court of the King; and he who was at once the ruler and judge of the whole nation, exercised the powers which he possessed, either directly (and this he did to a greater extent than modern students are apt to suppose), or indirectly, through the instrumentality of his great officers. Hence the authority of the 'Curia Regis' was as immense and as undefined as that of the Monarch. * * *

The rise of the Courts of Law made more definite the position of the Council, but the province of its authority was not marked out in the manner which would seem the most natural to a modern reader. It appears indeed at first sight a reasonable supposition, that the powers given to the Law Courts were taken away from the Council; that, in other words, the Council (which is nothing more than the 'Curia Regis' when separated from the judicial tribunals,) and the Law Courts, occupied distinct provinces. Such an assumption is, nevertheless, confuted by facts. Long after the erection of the Law Courts the Council exercised considerable, though peculiar, judicial authority. This anomaly is easy to explain. The exercise of judicial power is a Royal prerogative. In every law court the King is supposed present. Originally he doubtless really presided, and administered justice, surrounded by his court (curia). The pressure of business soon made it impossible for him to perform all his duties in his own person, and he gradually delegated his authority to the regular judges. This delegation, however, did not strip the Crown of its prerogative. Though the King ordinarily exercised his judicial powers through judges, who acted according to set laws and precedents, it was still his right to try suits, either on his own authority or through the great men of his Council. It could, indeed, scarcely be supposed that when the King's Bench exercised its jurisdiction, as being the 'Curia Regis coram ipso rege,' the King could not decide causes in that assembly, which was emphatically the 'Curia Regis.'

This more direct exertion of the King's power was naturally and of necessity called into action, when for any reason the Law Courts were unable to give justice. They might fail to grant redress, either because, to use the expressive words of various ordinances, 'there was too great might on the one side, and too great unmight on the other,' or because the grievance referred

to them was one which the technical rules of law did not meet. In each case the person aggrieved would naturally apply for aid to the King and his Council. In both instances the King would, among other counsellors, specially consult the Chancellor, his great legal officer. Hence the close connection between the Chancellor and the Council—a connection which, from the effects it produced, requires particular notice. At a period when the 'Aula Regia' still constituted one individual body, one officer, the Chancellor, had, as his peculiar duty, to affix the great seal to writs, grants, &c. Hence, when the division of powers took place, he became the head of a Court, before which were brought all questions affecting the royal grants. As president of this Court, he may be considered to have exercised a jurisdiction as independent of the King's Council as did the Barons of the Exchequer, or the Justices of the King's Bench. Yet even in his capacity of Common Law Judge, the Chancellor was connected somewhat more closely with the Council than were the other judges, both because the passing of grants was a prerogative kept strictly in the Crown's own hands, on the exercise of which the advice of the whole Council was frequently taken, and because, when the Council caused writs to be issued, it was forced to act through the Chancellor. He however, occupied another position besides that of Judge in a particular Court. As the greatest legal officer of the realm, after the office of Grand Justiciary was abolished; as an Ecclesiastic consulted by the King on all questions of conscience; as, from his possession of the great seal, having knowledge of every grant made by the Crown, he was the Council's most influential Law Officer.

Thus before he began to exercise an equitable jurisdiction of his own, he must, as may be certainly assumed, have been consulted about every legal matter debated in Council. All therefore who needed redress, which the Law Courts could not afford, brought their complaints, either before the Council, or before the Chancellor, as the Council's highest official. Hence the union between the Chancellor's and the Council's jurisdiction. * * *

The clearest view of the Council's relation to the Chancellor is given by the ordinance 8 Ed. 1. Its main object is 'that no petitions may come before the King and his Council, but by the hands of his said Chancellor and other chief Ministers. So that the King and his Council may, without the load of other business attend to the Great business of his realm, and of other foreign Countries.'

Here again the Chancellor is seen acting as a member of the Council; and the language of the Proclamation suggests the reason of the change, which, before the reign of Richard II, had taken place in the relative positions of the great law officer, and the deliberative body to which it belonged. As the Law Courts had branched off from the 'Curia Regis,' so the Chancery began to separate from the Council. The exact steps, by which the process of separation was carried out, cannot be known. But it may readily be supposed that the pressure of other business, and a distaste to the niceties of legal discussion, made the Council glad to first refer matters of law to the Chancellor, and next to leave them entirely to his decision. Whatever the steps of the change, a great alteration took place, and before the death of Edward III, the Chancellor decided matters of equity on his own authority, and gave assistance to those hindered by violence from obtaining aid through the regular course of law. The date of his establishment as a Judge of Equity is approximately marked by a proclamation of Edward III, which referred matters of grace to the Chancellor's decision. Though, from about this date, the Chancellor exercised

an independent jurisdiction, the Council's power suffered no diminution. Both the Council and the Chancellor aided those whom Common Law was unable to protect. Both the Chancellor and the Council enforced obligations binding in conscience though not in law. Attacks made on the power of the Chancellor are attacks on the authority of the Council,—and the Council in Chancery can hardly be distinguished from the Chancellor's own Court.—*Dicey, The Privy Council, p.* 7, *and p.* 12 *et seq.*

Having thus ascertained what is the true nature and character of Equity Jurisprudence as it is administered in countries governed by the common law, it seems proper, before proceeding to the consideration of the particulars of that jurisdiction, to take a brief review of its origin and progress in England, from which country America has derived its own principles and practice on the same subject. It is not intended here to speak of the Common Law Jurisdiction of the Court of Chancery, or of any of its specially delegated jurisdiction in exercising the prerogatives of the Crown, as in cases of infancy and lunacy: or of its statutable jurisdiction in cases of bankruptcy. The inquiry will mainly relate to its equitable, or, as it is sometimes called, its extraordinary jurisdiction.

The origin of the Court of Chancery is involved in the same obscurity which attends the investigation of many other questions of high antiquity relative to the common law. The administration of justice in England was originally confided to the Aula Regis, or great Court or Council of the King, as the Supreme Court of Judicature, which in those early times undoubtedly administered equal justice according to the rules of both law and equity, or of either, as the case might chance to require. When that court was broken into pieces, and its principal jurisdiction distributed among various courts, the Common Pleas, the King's Bench, and the Exchequer, each received a certain portion, and the Court of Chancery also obtained a portion. But at that period the idea of a Court of Equity as contradistinguished from a Court of Law does not seem to have subsisted in the original plan of partition, or to have been in the contemplation of the sages of the day. Certain it is that among the earliest writers of the common law, such as Bracton, Glanvill, Britton, and Fleta, there is not a syllable to be found relating to the equitable jurisdiction of the Court of Chancery. Fleta indeed mentions the existence of a certain office called the Chancery, and that to the office 'it belongs to hear and examine the petitions and complaints of plaintiffs, and to give them, according to the nature of the injuries shown by them, due remedy by *the writs of the King.*'

That the Court of Chancery, in the exercise of its ordinary jurisdiction, is a court of very high antiquity, cannot be doubted. It was said by Lord Hobart that it is an original and fundamental court, as ancient as the kingdom itself. The name of the court, Chancery (Chancellaria), is derived from that of the presiding officer, Chancellor (Cancellarius), an officer of great distinction, whose office may be clearly traced back before the Conquest, to the times of the Saxon kings, many of whom had their chancellors. Lord Coke supposes that the title 'Cancellarius' arose from his cancelling (a cancellando) the king's letters patent when granted contrary to law, which is the highest point of jurisdiction. But the office and name of Chancellor (Mr. Justice Blackstone has observed) was certainly known to the courts of the Roman emperors, where it originally seems to have signified a chief scribe, or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince. From the Roman emperors

it passed to the Roman Church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such other public instruments of the Crown as were authenticated in the most solemn manner; and therefore when seals came in use he always had the custody of the king's great seal.

It is not so easy to ascertain the origin of the equitable or extraordinary jurisdiction of the Court of Chancery. By some persons it has been held to be as ancient as the kingdom itself. Others are of a different opinion. Lambard, who (according to Lord Coke) was a keeper of the Records of the Tower, and a Master in Chancery, says that he could not find that the chancellor held any Court of Equity, nor that any causes were drawn before the chancellor for help in equity before the time of Henry IV.; in whose days, by reason of intestine troubles, feoffments to uses did first begin, as some think. Lord Coke says it has been thought that this Court of Equity began in the reign of Henry V., and increased in the reign of Henry VI.; but that its principal growth was during the chancellorship of Cardinal Wolsey, in the reign of Henry VIII. And he adds, in another place, that we find no cases in our books reported before the reign of Henry VI. Lord Coke's known hostility to the jurisdiction of the Court of Chancery would very much abate our confidence in his researches, if they were not opposed by other pressing authorities.

Lord Hale's account of the matter is as follows: 'There were many petitions referred to the Council (meaning either the Privatum Concilium or Legale Concilium Regis) from the Parliament; sometimes the answers to particular petitions, and sometimes whole bundles of petitions in Parliament which by reason of a dissolution could not be there determined, were referred, in the close of the Parliament, sometimes to the Council in general, and sometimes to the chancellor. And this I take to be the true original of the Chancery Jurisdiction in matters of equity, and gave rise to the multitude of equitable causes to be there arbitrarily determined.' And he afterwards adds: 'Touching the equitable jurisdiction (in chancery), though in ancient time no such thing was known, yet it hath now so long obtained, and is so fitted to the disposal of lands and goods, that it must not be shaken, though in many things fit to be bounded or reformed. Two things might possibly give original [jurisdiction], or at least much contribute to its enlargement. (1) The usual committing of particular petitions in Parliament, not there determined, unto the determination of the chancellor, which was as frequent as to the Council; and such a foundation being laid for a jurisdiction, it was not difficult for it to acquire more. (2) By the invention of *uses* (that is, *trusts*), which were frequent and necessary, especially in the times of dissension touching the Crown. In these proceedings the chancellor took himself to be the only dispenser of the king's conscience; and possibly the Council was not called, either as assistants or co-judges.' We shall presently see how far these suggestions have been established.

Lord Hardwicke seems to have accounted for the jurisdiction in another manner. The chancery is the grand Officina Justitiæ, out of which all original writs issue under the great seal, returnable into the Courts of Common Law, to found proceedings in actions competent to the Common Law Jurisdiction.

The chancellor therefore (according to Lord Hardwicke) was the most proper judge whether upon any petition so referred such a writ could not be framed and issued by him as might furnish an adequate relief to the party; and if he found the common-law remedies deficient, he might proceed according to the extraordinary power committed to him by the reference: Ne Curia Regis deficeret in justitia exercenda. Thus the exercise of the equitable jurisdiction took its rise from his being the proper officer to whom all applications were made for writs to ground actions at the common law; and from many cases being brought before him in which that law would not afford a remedy, and thereby being induced through necessity or compassion to extend a discretionary remedy. If (Lord Hardwicke added) this account of the original of the jurisdiction in equity in England be historically true, it will at least hint one answer to the question how the forum of common law and the forum of equity came to be separated with us. It was stopped at its source, and in the first instance; for if the case appeared to the chancellor to be merely of equity, he issued no original writ, without which the Court of Common Law could not proceed in the cause, but he retained the cognizance to himself. The jurisdiction then may be deemed in some sort a resulting jurisdiction in cases not submitted to the decision of other courts by the Crown, or Parliament, as the great fountain of justice.

Lord King (or whoever else was the author of the treatise entitled, 'The Legal Judicature in Chancery stated') deduced the jurisdiction of the Court of Chancery from the prerogative of the king to administer justice in his realm, being sworn by his coronation oath to deliver his subjects æquam et rectam justitiam. This it was impossible for him to do in person; and therefore of necessity he delegated it, by several portions, to ministers and officers deputed under him. But inasmuch as positive laws must in their nature consist of general institutions, there was of necessity a variety of particular cases still happening where no proper or adequate remedy could be given by the ordinary courts of justice. Therefore to supply this want, and correct the rigor of the positive law, recourse was had to the king as the fountain of justice, to obtain relief in such cases. The method of application was by bills or petitions to the king, sometimes in Parliament and sometimes out of Parliament, commonly directed to him and his Council; and the granting of them was esteemed not a matter of right, but of grace and favor. When Parliament met, there were usually petitions of all sorts preferred to the king; and the distinguishing of these petitions and giving proper answers to them occasioned a weight and load of business, especially when Parliament sat but a few days. Accordingly in the 8th of the reign of Edward I. an ordinance passed by which petitions of this sort were to be referred, according to their nature, to the chancellor and the justices; and in matters of grace, to the chancellor. And if the chancellor and others could not do without the king, then they were to bring the matter with their own hands before the king, to know his pleasure. So that no petitions should come before the king and his Council, but by the hands of the chancellor and other chief ministers. And hence the writer deduces the conclusion that at this time all matters of grace were determinable only by the king. And he added that he did not find any traces of a Court of Equity in chancery in the time of Edward II., and that it seemed to him that the equity side of the court began in the reign of Edward III., when by proclamation he referred matters of grace to the cognizance of the chancellor. And the jurisdiction was clearly established and acted on in the reign of Richard II.

Mr. Justice Blackstone seems to rely on the same general origin of the jurisdiction of chancery, as arising from the reference of petitions from the Privy Council to the chancellor; and also from the introduction of uses of land, about the end of the reign of Edward III. Mr. Wooddeson deduces the jurisdiction from the same source, and lays great stress on the proclamation of 22 Edw. III.; and also on the statute of 36 Edw. III. (stat. 1, ch. 9), which he, as well as Spelman, considers as referring many things to the sole and exclusive cognizance of the chancellor. And he adds, that it seems incontrovertible that the chancery exercised an equitable jurisdiction, though its practice perhaps was not very flourishing or frequent through the reign of Edward III.

But all our juridical antiquaries admit that the jurisdiction of chancery was established, and in full operation, during the reign of Richard II.; and their opinions are supported by the incontrovertible facts contained in the remonstrances and other acts of Parliament. At this period the extensive use or abuse of the powers of chancery had become an object of jealousy with Parliament, and various efforts were made to restrain and limit its authority. But the Crown steadily supported it. And the invention of the writ of subpœna by John Waltham, Bishop of Salisbury, who was Keeper of the Rolls, about the 5th of Richard II., gave great efficiency, if not expansion, to the jurisdiction. In the 13th of Richard II. the Commons prayed that no party might be required to answer before the chancellor or the Council of the king for any matter where a remedy is given by the common law, unless it be by writ of scire facias in the county where it is found by the common law. To which the king answered that he would preserve his royalty, as his progenitors had done before him. And the only redress granted was by Stat. 17 Richard II., ch. 6, by which it was enacted that the chancellor should have power to award damages to the defendant, in case the suggestions of the bill were untrue, according to his discretion. The struggles upon this subject were maintained in the subsequent reigns of Henry IV. and V. But the Crown resolutely resisted all appeals against the jurisdiction; and finally, in the time of Edward IV., the process by bill and subpœna was become the daily practice of the court.

Considerable new light has been thrown upon the subject of the origin and antiquity of the equitable jurisdiction of the Court of Chancery by the recent publication of the labors of the Commissioners on the Public Records. Until that period the notion was very common (which was promulgated by Lord Ellesmere) that there were no petitions of the chancery remaining in the office of record before the 15th year of the reign of Henry VI. But it now appears that many hundreds have been lately found among the records of the Tower for nearly fifty years antecedent to the period mentioned by Lord Ellesmere, and commencing about the time of the passage of the statute of 17 Rich. II. ch. 6. But there is much reason to believe that upon suitable researches many petitions or bills addressed to the chancellor will be found of a similar character during the reigns of Edward I., Edward II., and Edward III.

From the proceedings which have been published by the Record Commissioners it appears that the chief business of the Court of Chancery in those early times did not arise from the introduction of uses of land, according to the opinion of most writers on the subject. Very few instances of applications to the chancellor on such grounds occur among the proceedings of the chancery during the first four or five reigns after the equitable jurisdiction of the court

seems to have been fully established. Most of these ancient petitions appear to have been presented in consequence of assaults and trespasses and a variety of outrages which were cognizable at common law, but for which the party complaining was unable to obtain redress in consequence of the maintenance and protection afforded to his adversary by some powerful baron, or by the sheriff, or by some officer of the county in which they occurred.

If this be a true account of the earliest known exercises of equitable jurisdiction, it establishes the point that it was principally applied to remedy defects in the common-law proceedings; and therefore that equity jurisdiction was entertained upon the same ground which now constitutes the principal reason of its interference, viz., that a wrong is done, for which there is no plain, adequate, and complete remedy in the Courts of Common Law. And in this way great strength is added to the opinions of Lord Hale and Lord Hardwicke, that its jurisdiction is in reality the residuum of that of the Commune Concilium or Aula Regis, not conferred on other courts, and necessarily exercisable by the Crown as a part of its duty and prerogative to administer justice and equity. The introduction of Uses or Trusts at a later period may have given new activity and extended operation to the jurisdiction of the court, but it did not found it. The redress given by the chancellor in such cases was merely a new application of the old principles of the court, since there was no remedy at law to enforce the observance of such uses or trusts.

From this slight review of the origin and progress of equitable jurisdiction in England, it cannot escape observation how naturally it grew up in the same manner, and under the same circumstances, as the equitable jurisdiction of the prætor at Rome. Each of them arose from the necessity of the thing in the actual administration of justice, and from the deficiencies of the positive law (the lex scripta), or from the inadequacy of the remedies, in the prescribed forms, to meet the full exigency of the particular case. It was not an usurpation for the purpose of acquiring and exercising power, but a beneficial interposition, to correct gross injustice and to redress aggravated and intolerable grievances.

But be the origin of the equity jurisdiction of the Court of Chancery what it may, from the time of the reign of Henry VI. it constantly grew in importance; and in the reign of Henry VIII. it expanded into a broad and almost boundless jurisdiction under the fostering care and ambitious wisdom and love of power of Cardinal Wolsey. Yet (Mr. Reeves observes), after all, notwithstanding the complaints of the Cardinal's administration of justice, he has the reputation of having acted with great ability in the office of chancellor, which lay heavier upon him than it had upon any of his predecessors, owing to the too great care with which he entertained suits, and the extraordinary influx of business, which might be attributed to other causes. Sir Thomas More, the successor to the Cardinal, took a more sober and limited view of Equity Jurisprudence, and gave public favor as well as dignity to the decrees of the court. But still there were clamors from those who were hostile to equity during his time, and especially to the power of issuing injunctions to judgments and other proceedings, in order to prevent irreparable injustice. This controversy was renewed with much greater heat and violence in the reign of James I., upon the point whether a Court of Equity could give relief for or against a judgment at common law; and it was mainly conducted by Lord Coke against, and by Lord Ellesmere in favor of, the chancery jurisdiction. At last the matter came directly before the king, and upon the advice and

opinion of very learned lawyers to whom he referred it, his Majesty gave judgment in favor of the equitable jurisdiction in such cases. Lord Bacon succeeded Lord Ellesmere; but few of his decrees which have reached us are of any importance to posterity. But his celebrated ordinances for the regulation of chancery gave a systematical character to the business of the court; and some of the most important of them (especially as to bills of review) still constitute the fundamental principles of its present practice.

From this period down to the time when Sir Heneage Finch (afterwards Earl of Nottingham) was elevated to the Bench (in 1673), little improvement was made either in the principles or in the practice of chancery; and none of the persons who held the seal were distinguished for uncommon attainments or learning in their profession. With Lord Nottingham a new era commenced. He was a person of eminent abilities and the most incorruptible integrity. He possessed a fine genius, great liberality of views, and a thorough comprehension of the true principles of equity; so that he was enabled to disentangle the doctrines from any narrow and technical notions, and to expand the remedial justice of the court far beyond the aims of his predecessors. In the course of nine years, during which he presided in the court, he built up a system of jurisprudence and jurisdiction upon wide and rational foundations, which served as a model for succeeding judges, and gave a new character to the court; and hence he has been emphatically called 'the father of Equity.' His immediate successors availed themselves very greatly of his profound learning and judgment. But a successor was still wanted, who with equal genius, abilities, and liberality should hold the seals for a period long enough to enable him to widen the foundation and complete the structure begun and planned by that illustrious man. Such a successor at length appeared in the person of Lord Hardwicke. This great judge presided in the Court of Chancery during the period of twenty years; and his numerous decisions evince the most thorough learning, the most exquisite skill, and the most elegant juridical analysis. There reigns throughout all of them a spirit of conscientious and discriminating equity, a sound and enlightened judgment as rare as it is persuasive, and a power of illustration from analogous topics of the law as copious as it is exact and edifying. Few judges have left behind them a reputation more bright and enduring; few have had so favorable an opportunity of conferring lasting benefits upon the jurisprudence of their country; and still fewer have improved it by so large, so various, and so important contributions. Lord Hardwicke, like Lord Mansfield, combined with his judicial character the still more embarrassing character of a statesman, and in some sort of a minister of state. Both of them of course encountered great political opposition (whether rightly or wrongly it is beside the purpose of this work to inquire); and it is fortunate for them that their judicial labors are embodied in solid volumes, so that when the prejudices and the passions of the times are past away, they may remain open to the severest scrutiny, and claim from posterity a just and unimpeachable award. * * *

In America Equity Jurisprudence had its origin at a far later period than the jurisdiction properly appertaining to the Courts of Common Law. In many of the colonies, during their connection with Great Britain, it had either no existence at all, or a very imperfect and irregular administration. Even since the Revolution, which severed the ties which bound us to the parent country, it has been of slow growth and cultivation; and there are still some States in whose municipal jurisprudence it has no place at all, or no place

as a separate and distinct science. Even in those States in which it has been cultivated with the most success and for the greatest length of time, it can scarcely be said to have been generally studied or administered as a system of enlightened and exact principles until about the close of the eighteenth century. Indeed until a much later period, when Reports were regularly published, it scarcely obtained the general regard of the profession beyond the purlieus of its immediate officers and ministers. Even in the State of New York, whose rank in jurisprudence has never been second to that of any State in the Union (if it has not been the first among its peers) equity was scarcely felt in the general administration of justice until about the period of the Reports of Caines and of Johnson. And perhaps it is not too much to say that it did not attain its full maturity and masculine vigor until Mr. Chancellor Kent brought to it the fulness of his own extraordinary learning, unconquerable diligence, and brilliant talents. If this tardy progress has somewhat checked the study of the beautiful and varied principles of equity in America, it has on the other hand enabled us to escape from the embarrassing effects of decisions which might have been made at an earlier period, when the studies of the profession were far more limited and the benches of America were occasionally, like that of the English Chancery in former ages, occupied by men who, whatever might have been their general judgment or integrity, were inadequate to the duties of their stations, from their want of learning or from their general pursuits. Indeed there were often other circumstances which greatly restricted or impeded a proper choice; such as the want of the due enjoyment of executive or popular favor by men of the highest talents, or the discouragement of a narrow and incompetent salary.

The Equity Jurisprudence at present exercised in America is founded upon, co-extensive with, and in most respects conformable to, that of England. It approaches even nearer to the latter than the jurisdiction exercised by the Courts of Common Law in America approaches to the common law as administered in England. The common law was not, in many particulars, applicable to the situation of our country when it was first introduced. Whereas Equity Jurisprudence in its main streams flows from the same sources here that it does in England, and admits of an almost universal application in its principles. The Constitution of the United States has in one clause conferred on the National Judiciary cognizance of cases in equity as well as in law; and the uniform interpretation of that clause has been that by cases in equity are meant cases which, in the jurisprudence of England (the parent country), are so called as contradistinguished from cases at the common law. So that in the Courts of the United States Equity Jurisprudence generally embraces the same matters of jurisdiction and modes of remedy as exist in England.

In nearly all the States in which Equity Jurisprudence is recognized it is now administered in the modes and according to the forms which appertain to it in England; that is, as a branch of jurisprudence separate and distinct from the remedial justice of Courts of Common Law. In Pennsylvania it was formerly administered through the forms, remedies, and proceedings of the common law; and was thus mixed up with legal rights and titles in a manner not easily comprehensible elsewhere. This anomaly has been in a considerable degree removed by some recent legislative enactments. In some of the States in the Union distinct Courts of Equity are established; in others the powers are exercised concurrently with the Common Law Jurisdiction by the same tribunal, being at once a Court of Law and a Court of Equity, somewhat analogous

to the case of the Court of Exchequer in England. In others again no general equity powers exist; but a few specified heads of Equity Jurisprudence are confided to the ordinary Courts of Law, and constitute a limited statutable jurisdiction.—*Story, Equity Jurisprudence,* (13*th ed.*), *vol. I, C.* 2.

Reasons for Applying to the Chancellor.

The Court of Chancery became necessary because it was found that the Courts of Common Law were, from various causes, frequently unable to do justice to suitors. This might result from two classes of reasons: (1) from the inelasticity of its principles and practice; (2) from the peculiar situation of the parties in cases which could otherwise have been dealt with at common law.

The first of these classes constitutes what came at a later date to be called equitable matters—cases to be decided in Chancery on principles peculiar to itself, and will be dealt with later.

The second class was not concerned in any way with the doctrines of equity; and, some time towards the end of the fifteenth century, the Court of Chancery ceased to deal with them altogether. In the early days of that Court, however, such cases formed by far the principal bulk of the work of the Court. Such matters, as has already been pointed out, came within the jurisdiction of the Council. A reference to the first part of this volume will show how numerous such cases were, and how varied the detail, though the same principles underlay them all.

Most of these early cases allege some special reason why the Chancellor should interfere, and these allegations throw a useful light on the principles from time to time guiding and influencing the Court.

The reasons in what I may call the Council cases, that is, those for which in theory the common law provided a remedy, are mostly concerned with the power and violence of the defendant.

In case 5, we are told that the defendants will not be justified by the sheriff of the county against their will, nor will they at any time, unless the King betakes himself against them seriously.

In case 6, the plaintiffs, who are the constables of a Hundred, say that they dare not perform their office unless the defendants find sureties for the peace.

In case 10, the plaintiff states that no one dare bring suit against the defendant, as the common law demands, because of his great maintenance.

In other cases—21, 26, 29, &c.—the plaintiff simply states that he dares not sue at common law.

In case 24, the plaintiff would have sued at Lincoln in the King's Bench, but could not find any one who dared to act as her counsel, for fear of the defendant's malice.

In case 31, the plaintiff says piteously that he can never recover at common law because the defendant is so rich and so strong in friends in the country where he dwells.

In case 35, it is stated that no writs or orders of the King will be obeyed, and no jurors will dare to do their duty in those parts, if the defendants are not punished.

In case 36, the Chancellor is asked to interfere, so that the very good laws of the King and his noble realm may be honestly kept, virtues exalted, and crimes and oppressions of the people punished and chastised.

In case 41, the defendant has so many evildoers confederated with him, and

is of such horrible maintenance, that the plaintiff cannot recover at common law.

In case 44, the defendants are so great in their country, in kinsmen, alliances, and friends.

In case 51, the defendant is so great a maintainer, extortioner, and conducer of inquests in his country, that no one dare contradict him.

In case 67, a case of forcible entry and ouster, the plaintiff merely says that there is no speedy remedy at common law.

In case 94, the plaintiff cannot sue at common law because he is employed in defence of the realm; while in case 98 the plaintiff asks for a special assize, because at the time of the assizes he is engaged with the Justices of Assize in other counties, and so cannot sue in Yorkshire.

In Cal. i. xix., the plaintiff cannot sue at common law because he is in prison.

In many cases the poverty of the plaintiff is urged as the sole reason why the Chancellor should interfere. See cases 37, 43, 80, 139, and Cal. i. xiii.; ii. xii.

In this last case the plaintiffs say that they are 'so pouere that thay may not apparay wyth the said John in no sute ne tryall at the lawe.'

In Cal. i. xxxv., the Friars Minors of London say that they are 'pore men, gretely endetted, and loth to spende on plee.'

In Cal. i. xiv., the plaintiffs are poor, and one of them is so ill that they cannot sue at common law.

In case 73, the plaintiff says that the defendant absenteth himself and departeth from place to place so that she can have no recovery nor remedy against him at common law.

In case 110, the plaintiffs say that they can have no remedy at common law in the King's absence. This case is unfortunately not dated. Mr. Bayley, from whose MS. transcripts at the Record Office I have copied the bill, dates it as 'probably Henry V.' I have not been able to find the original, so cannot express any opinion. There was a Sir William Bardolf at that time. I confess I cannot understand the allegation; so far as I know, the issuing of writs and the proceedings of the Common Law Courts were not affected by the King's absence.

In case 127 the plaintiff wishes to recover against the estate of one who died outlawed, and whose goods consequently were forfeited to the Crown, whereby the plaintiff was 'destitute of alle maner of remedie at the comune lawe.'

It will be seen from these illustrations that the rules laid down by the Council were not of a very rigid nature, and that there was some reason in the constant complaint of interference with the course of common law. On the other hand, it is not at all uncommon to find bills dismissed on the ground that the ordinary tribunals were able to deal with the matter, and if we had anything like a large percentage of recorded judgments, there is no doubt we should find that this was very frequently done.

In certain pleas which were supposed to concern the King, the allegation was of a different kind.

In case 12, the Mayor and citizens of Chichester state that the doings they complain of are 'to their great damage, and to the hindrance of the payment of the King's fee-farm rent.'

In case 15, the reason given is 'the contempt and prejudice done to the King,' with regard to the grant of some forfeited lands.

In case 17, it is 'in safeguard of the peace of the King, his crown, and dignity.' This case is one of violent assault on constables.

In case 32, the plaintiff says that certain outrages are openly done against the King, his crown, and his peace.

In case 48, the ouster of an incumbent, who was presented by Richard II., is said to be the great prejudice, reproof, and damage of Henry IV. Case 92 is similar.

In case 81, the King's tenants complain of ejectment, and ask for a remedy for the King's profit as well as for that of the defendants.

In case 47, the plaintiff was grantee of the wardship of A, who was lord of the manor of B, which was held *in capite*. Defendant took possession of the manor, in contempt of the King and disinherison of the ward, as well as to the damage of the plaintiff.

In case 112, the plaintiffs allege they have been unjustly deprived of the money paid for the ransom of certain prisoners, of which the King was entitled to a share.

In what may be termed the equity cases, the reason given for the Chancellor's interference is generally that the plaintiff has no remedy at common law. The stumbling-block might be either in principle or in procedure. Most of these matters will be more conveniently considered in the next sections, but one or two may be mentioned here.

In case 4, the defendants cannot have any remedy at common law because the tenements from which they have been ousted are within a franchise, and the lord of the franchise is implicated in the wrong-doing of the defendants.

1417-1422; Cal. ii. viii. The plaintiffs, the Provost and commonalty of P, complain of interruption in holding of their market. They cannot proceed at common law because the defendants are of the commonalty.—*Select Cases in Chancery*, 10 *Selden Society, Introduction pp.* xxi. *to* xxiv.

Principles on which the Chancellor Acted.

The principles on which the decisions of the Chancellor in the exercise of the extraordinary jurisdiction thus committed to him were founded, were, it would seem, those of Honesty, Equity, and Conscience. The latter, as a principle of decision, was then unknown to the common law,—it was of clerical introduction; Equity was known to the Roman law, and was, as we have seen, long before this acknowledged, to some extent at least, as a rule for decision in the common law courts; but Equity is reserved for a more full discussion in a subsequent page. * * *

Thus it appears that a jurisdiction to interfere, in some cases at least, with the rules and maxims of the law on the grounds of equity and conscience, as well as to supply its defects was clearly exercised. We have next to endeavour to find out what were the specific principles by which this interference with the law was regulated; in other words, what meaning was attached to the terms Equity and Conscience, which were the guides by which the Chancellors were to be directed.

The term Conscience, as denoting a principle of judicial decision, appears to have been of clerical invention; it seems to have embraced the obligations which resulted from a person being placed in any situation as regards another that gave to the one a right to expect, on the part of the other, the exercise of good faith towards him; and nearly resembled the *bona fides* of the Prætorian Code, as illustrated by its various commentators.

The Ecclesiastical Courts, as we have seen, originally assumed jurisdiction in all cases of breach of faith, operating, no doubt, by means of their spiritual authority upon the *conscience* of the party complained of. When those courts were prohibited from taking cognizance of breach of faith affecting contracts between laymen, cases of conscience could only be the subject of cognizance in the Council or the Court of Chancery; ultimately under Conscience a wide field of jurisdiction was introduced, embracing all departures from fair dealing and honesty, and it included some cases which might perhaps be more appropriately ranged under the head of Public Policy.

The Roman Law furnished a guide as to the Equity which was to be administered by the Court of Chancery, which we shall see was largely taken advantage of. I may here notice one instance, which Cicero supplies, of the correction by general principles of equity, of a rule of law itself founded on equity. The law on principles of equity had established as a maxim that the seller of an estate should make compensation for all the incumbrances that he knew of, and which he might omit to communicate at the time of the contract. One Gratidianus had sold a house to C. Sergius Orata, which the latter had shortly before purchased of the same Gratidianus. Sergius Orata was entitled to a right of way or some other *servitus*, or as we may say *easement*, over this property which Gratidianus naturally did not mention at the time of sale. Orata taking advantage of this omission, insisted that he was entitled, according to the settled rule of law to compensation for the easement, and he commenced an action to recover it. This being an *actio bonæ fidei*, an equitable defence was, as we have seen, admissible. Crassus was the advocate of Orata, Anthony of Gratidianus; the remainder is best told in Cicero's own words: "*Jus* Crassus urgebat—quod vitii venditor non dixisset sciens id oportere præstari."—"*Æquitatem* Antonius, quoniam id vitium ignotum Sergio non fuisset, qui illas ædes vendidisset, nihil fuisse necesse dici; nec eum esse deceptum, qui id quod emerat quo jure esset teneret." "Quorsum hæc," adds Cicero, "ut illud intelligas non placuisse majoribus nostris *astutos*." So "Si verbis et literis, et ut dici solet *summo jure* contenditur, solent ejusmodi iniquitati, *Boni* et *Æqui* nomen dignitatem que opponere."

Looking to the cases to which this principle was applied, which will presently be noticed in detail, the delegated authority to decide according to equity, may have been considered to have embraced all those cases in which a party, without having committed any act which would be considered as contrary to good faith or conscience, might yet by the rigour of the positive provisions of the law,—though founded as regards their general application on natural justice,—or by the silence of the law,—the particular case not having been provided for at all, —have an advantage which it was contrary to the principles of equity that he should be permitted to enforce or to retain. In such cases the general principles of equity in the sense of natural justice, which are antecedent to all positive law, were resorted to. Where the rigour of the law favoured the position of the party who had committed any unconscientious act, that would be relieved against, also, under the head of conscience.

However, if any distinction was originally recognized as to the respective import of the terms Equity and Conscience, they soon became confounded, and a very considerable latitude was admitted in the application of the terms Equity and Conscience. A new head of equity under the name of Cases of Extremity, which comprehended the modern jurisdiction under the title of Accident, was afterwards introduced.

Some extravagances which originated perhaps in too high an estimate on the part of the Chancellors of Henry VIII. and Elizabeth, of their individual endowments, and erroneous views as to the nature of their office, occasioned in part by the language of flattery, gave occasion to the great Selden to remark, more perhaps in jest than in earnest, that equity was a roguish thing; it was according to the conscience of him that was Chancellor, and as that was larger or narrower so was equity. This might indeed have been a true picture of the court on its original foundation, had not the equitable doctrines and provisions of the Roman Law been taken as the principles on which its decisions were to be founded; but it is plain that the jurisdiction never could have been established, if the conscience of the judge had been his only guide. It may be remarked, however, that too much consideration was sometimes given to the *Conscience of the Queen.* It is "the holy conscience of *the Queen*, for matter of equity," said Sir C. Hatton, "that is in some sort committed to the Chancellor;" and though the Queen may not have directly interfered in regard to the decision of any particular case, she not unfrequently commanded that cases should be heard in the Court of Chancery which did not come within any branch of its jurisdiction as a Court of Equity and Conscience.

But generally during this reign, as well as before, equity and conscience, as rules of decision, were referred to principles deduced from the Roman jurisprudence, the sanction of which was occasionally directly adverted to, independently of the private conscience of the judge. Nothing is recorded as having been delivered judicially from the bench which can warrant the supposition that the private opinion or conscience of the judge, or what is perhaps equivalent, his whim or caprice, independent of principle and precedent, was a legitimate ground of decision.—*Spence, Equitable Jurisdiction of The Court of Chancery, vol.* 1, *p.* 339, *and* 411 *et seq.*

Early Influences of the Roman Law.—In this work of constructing a jurisprudence, the early common-law judges, as well as the Chancellor at a later day, drew largely from their own knowledge of the Roman law. The evidence, both internal and historical, is conclusive that the common law of England, in the earliest formative period, was much indebted to that Roman jurisprudence which enters so largely into the judicial systems of all the western nations of the European continent. Besides the proof furnished by the law itself, several important facts connected with the external history of its primitive stages point to this conclusion. The clergy, who possessed all the learning of the times, were students of the Roman law. The earliest justices of the common-law courts, as well as the chancellors, were generally taken from the higher orders of ecclesiastics; and on all occasions where it was necessary for them to legislate in the decision of particular cases, to create new rules for relations hitherto undetermined, they naturally had recourse to the code with which they were familiar, borrowed many of its doctrines, and adopted them as the ground of their judgments. Nor was a knowledge of the Roman law confined to the courts; its study became a part of what would now be called the higher education. When the spirit of free inquiry was suddenly awakened at the commencement of the twelfth century, one of its most remarkable manifestations was shown in the scientific study of the Roman law which began at the University of Bologna in 1120, and soon extended over western Europe. In 1143, Archbishop Theobald, who had himself studied at Bologna, brought a distinguished civilian, Vacarius, into England, and this jurist in 1149 established a school of the Roman law at the University of Oxford, which soon rose

to an eminence second only to those of Paris and of Bologna. King Stephen afterwards prohibited Vacarius from public teaching, but this act, instead of stopping the study in England, produced the contrary effect of stimulating and promoting it. Bracton's celebrated work, De Legibus et Consuetudinibus Angliæ, written between A. D. 1256 and 1259, and which is an epitome or systematic institute of the common law as it then existed, exhibits in the plainest manner the results of the judicial labor and scientific study which had preceded it. A considerable portion of its doctrines, and even of the terms in which its rules are stated, is taken directly from standard treatises of the day upon the Roman jurisprudence. In the language of a recent writer: "As Roman legal matters obtained reception, although the written sources of the Roman law were not at all received as having a legislative authority, Bracton properly included such Roman legal matter among the *legcs et consuetudines Angliæ*."—*Pomeroy, Equity Jurisprudence, (3d ed.), vol.* 1, § 14.

The question how far precedent was regarded as binding on the Court and as limiting its jurisdiction under the early Chancellors and during the present period has excited much discussion. The more popular view is that of Blackstone and Lord Campbell, which Selden and Coke, Lord Ellesmere's contemporaries, held, and which made Whitelock, when offered the Great Seal under the Commonwealth, object to the responsibility, for, he said, "the judges of the Common Law have certain fixed rules to guide them; a Keeper of the Seal has nothing but his own conscience to direct him, and that is oftentimes deceitful. The proceedings in Chancery are 'secundum arbitrium boni viri,' and this *arbitrium* differs as much in several men as their countenances differ." Spence, on the other hand, has ably argued for the opposite conclusion. If the popular opinion be correct, he says, "it is a little extraordinary that causes" (under the Clerical Chancellors) "should have been brought to a hearing and heard with so much of ceremony and of regard to regularity" as the records exhibit. In his opinion the Clerical Chancellors, and, to a less extent, their lay successors, introduced the doctrines of the Civil Law, and were chiefly guided by adherence to its rules, and he shows how much similarity there is between many of its doctrines and the doctrines of equity as established by the end of the present period. But the importance of this similarity may, I suspect, be much overrated. Granting that the process of discovery by the oath of the Defendant, which the Chancery borrowed from the Canon Law, and of injunction to quiet possession, which Wolsey is charged with having introduced, bear close analogies to forms of procedure allowed at Rome, it is not clear that any of the doctrines of early equity can be traced to the Civil Law, although, when the construction of legacies and gifts *mortis causa*, at a later date, were taken over by Equity from the Ecclesiastical Courts, no doubt the Civil Law rules in regard to them were taken also. The Civil Law, as I have already said, was referred to as a repertory of moral principles, and, as such, it was accepted, not only in our Court of Chancery, but throughout the Western World. The Law of Nature to which the publicists of a later age constantly referred was nothing more than the Civil Law denuded of its technicalities, and modified occasionally by contrast with the positive morality of the Christian system. In this sense the Ecclesiastical Chancellors perhaps referred to the Civil Law, and guided their discretion by its rules, but in this alone. The protection of trusts may have been suggested by the double ownerships of the older code, but such ownerships, as already shown, were known apart from it, and the wording of the earlier

bills in Chancery would suggest that it was due to the simple principle of compelling a Trustee to give up what he had only received on an express undertaking to do so. The great doctrine of Specific Performance of obligations both arising *ex contractu*, and apart from agreement, is wholly without warrant from the Roman Law. * * *

The influence of Roman Law upon equity has several times been adverted to in this essay, and a fresh perusal of these leading cases has confirmed the opinion I have already expressed, that the earlier has directly contributed very little to the later system. In cases relating to the descent of personality on an intestacy, or under a will, the Civil Law rules were, of course, more or less adhered to, for they had been originally adopted in such matters by the Ecclesiastical Courts. Thus the House of Lords in the case of the half-blood next-of-kin heard civil as well as common lawyers, and in cases like *Asburner v. Macguire* (2 W. and T. 246, 1786, ademption of legacy) and *Scott v. Tyler* (2 W. and T. 120, 1787, legacy giving subject to a condition in restraint of marriage) there was much discussion of Roman Law. The sources from which the passages from the Institute and the Digest which was cited in Equity were almost invariably taken,—the text books of Ecclesastical law, Godolphin and Swinburne,—indicate clearly the uses to which they were applied. References to the Digest and the later Civilians occasionally occurred in the arguments and judgments in cases of a different character, but they were rare, and were used merely as illustrations, or in support of arguments of a general nature, as a modern lawyer might employ references to the Code of Napoléon. The definitions of fraud and negligence propounded and discussed by the Roman jurists, for example, were employed in this way, and it was no doubt for the sake of these that, at a time when the authorities of equity were certainly to be found solely in the English reports, Lord Westbury advised his pupils to make a constant study of the Digest. Certainly the general opinion has long been that the debt of equity to Roman Law was much greater than that here suggested, and comparisons between the two systems were common in the text books of the last century. The editor of the Reports of Lord Nottingham's time, for instance, annotated them with reference to Roman Law rules, for the assistance of practitioners. It was the fashion to trace prominent doctrines to the older law: thus Lord Eldon in *Mackreth v. Symmons* (1 W. and T. 355) traces the vendor's lien for unpaid purchase money to the rule "quod vendidi non aliter fit accipients quam si aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fiden habuerimus emptore sine ulla satisfactione," *Dig*, 18. 1, 50. 11, but on turning to the earliest case where the lien was allowed, it is found to have been grounded "on natural equity, that the lands should stand charged with so much of the purchase money as was not paid, and that without any special agreement for the purpose." *Chapman v. Tanner*, 1 Vern. 267, 1684.—*Kerly, History of Equity, p.* 100, *and* 189.

The general principles on which the Chancery was supposed to act in such matters as were not remediable at common law are variously expressed by the terms 'conscience,' 'good faith,' 'reason,' and so on, and more rarely 'equity.' One or more of these or some similar expressions occur in nearly all the early Chancery bills. The rarest of these, curiously enough, is the one that has survived and given its name to all cases of this class, equity. The word does not occur in this volume. It will be found in the writ from Henry V to the Chancellor in 1419 (Cal. i. 16, and *ante* p. xiii), where the Chan-

cellor is directed to do both right and equity. Also in 7 Edw. IV, 1467-8, where the Keeper is directed to act according to equity and good conscience (Cal. i. 84).

The word 'conscience' is used frequently. In case 123, unfortunately not dated, the Chancery is called the 'Court of Conscience.' Such expressions as 'conscience and law' (case 138), 'the law of conscience' (case 143), 'law and conscience' (cases 121, 136), 'law and right' (case 8, &c.), 'law, right, and good conscience' (case 121), 'right and reason' (case 26, &c.), 'reason and good faith' (case 72), &c. &c., are common enough.—*Select Cases in Chancery*, 10 *Selden Society, Introduction p.* xxix.

What is a Chancery Proceeding?

Before going further it will be well to define what is meant by the term 'Chancery Proceeding.' Petitions to the Chancellor in his capacity as a high officer of state are found at a very early period of our legal history, and many such are found among the 'Ancient Petitions,' as they are called, preserved at the Record Office. But clearly such petitions, although addressed to the Chancellor, are not in any sense 'proceedings.' There are four essentials to the Chancery Proceeding: (a) a petition addressed to the Chancellor or Keeper by a petitioner or plaintiff complaining of (b) an alleged wrong done by some specified person or persons, and asking (c) that the person complained of may be sent for to answer the complaint, and (d) that a remedy may be provided.

a. *The Petition or Bill.*

The actual form of the petition or bill needs little comment. There is wonderfully little variation in these from the earliest known down to their abolition by the Judicature Act of 1873. They are almost invariably in French, down to the reign of Henry V, when English forms became customary. One Latin bill occurs in this volume, No. 9. As a general rule each bill is addressed at the top to the Chancellor or Keeper, mentioning him by name, or by the name of his see when he is a Bishop. By this means it is possible to date approximately many bills which it would otherwise be impossible to date. Still, a goodly number are addressed simply to the Chancellor without giving any name, and most of these cannot be dated (Nos. 123-134).

The bill, as I have said, is generally addressed to the Chancellor or the Keeper, but there are some interesting and instructive exceptions. It is occasionally addressed to the king. There are no examples in this volume, but several will be found in the Calendar already referred to. Thus, in vol. 1, p. xvi, in 1419 the king is asked to write to the Chancellor 'to do clepe the parties afor him and examine hem and make an end by twene hem of all that hangeth bitwene hem in youre courtys.' The king accordingly writes to the Chancellor to that effect—'ye doo calle before yow bothe parties speciffied in the same supplication, and thair causes herd, that ye doo unto hem both righte and equite, and in especial that ye see that the porer partye suffre no wrong.'

In this volume, case 135 is a bill addressed to the Duke of Gloucester, the Protector, early in the reign of Henry VI, asking that the plaintiff may have of the Chancellor of England a writ that is called sub poena.

The most interesting variations from the usual form are those in which the Council is mentioned. No. 107, which can be dated about 1384, is addressed 'To the Chancellor of our most redoubted Lord the King, and to his most wise Council.' No. 19, which can be dated shortly after 1396, is addressed to the Chancellor, 'and to the other most wise Lords of the Council of our most redoubted Lord the King.' We shall see hereafter that the Council sat as

judges in the Court of Chancery well into the fifteenth century; it is perhaps a matter of surprise, therefore, that more petitions are not addressed to them.

b. *The alleged wrong.*

A petition to the Chancellor must allege some wrong done to the plaintiff if it is to be considered a Chancery Proceeding, and it must be a wrong of such a nature that the remedy thereof lies outside the administrative powers of the Chancellor. For it is obvious that many complaints could be remedied by the Chancellor of his own power and authority as a high official of state without calling for anything in the nature of legal proceedings or setting the machinery of the law in motion. At the same time it must be borne in mind that it is not easy by any means to draw a hard and fast line between the administrative and the judicial functions of the Chancellor in the fourteenth and early fifteenth centuries. Perhaps the safest plan is to say that when the Chancellor was asked to send for the defendant and to hear what he had to say, then the function was judicial, but not otherwise. Such a rule, however, must not be taken too strictly. For sometimes we find a petition asking for a general remedy without mentioning any writ, even though it may be perfectly clear from the terms of the bill that a proper investigation could not be made, and 'the full complement of justice' could not be given without the defendant's answer. Such a case must emphatically be considered as a Chancery Proceeding, and nos. 105 and 109 are therefore properly placed in this volume. We may reasonably suppose that such cases are early ones, and that the precise remedy was not clearly understood.

c. *The Writ.*

The third essential is the writ by which the defendant is brought before the Court. This is in by far the majority of cases the personal writ of sub poena. The same end might be secured by arrest, by venire facias, or by corpus cum causa. The sub poena was the ordinary writ; two early examples dated in 1388 and 1394 will be found in this volume, cases 7 and 11. Its history is obscure. John Waltham, who is credited with its invention (see *Rot. Parl.* iv. 84), was Master of the Rolls from 1381 to 1386, and a Master in Chancery during the same period. It is not known if he had previously been a Clerk in the Chancery (Foss.) If the story is true, its inception must have been before his appointment to that office, as the writ was certainly known before 1381. Palgrave gives a writ of sub poena dated in 1364, and that issued upon a bill addressed to the King and Council. (*Rot. Pat.* 38 Edw. III, pt. 1, m. 15.)

The question is one of slight importance, for there was another and, I think, an earlier writ for compelling the defendant's appearance. This is generally known as the quibusdam certis de causis. The name is not a happy one, for the sub poena and the premunire also begin with the same words. Indeed, the form of these first two writs is almost identical save for the penalty; the one enjoins attendance under the penalty of a certain sum of money, the other 'sub periculo quod incumbit,' 'sub gravi indignatione,' or some similar expression. See cases 2, 8, 9, 14 and 35 for examples. Thus the 'ingenious author' (as Palgrave calls him) of the sub poena, whoever he may have been, simply substituted a definite pecuniary penalty for an indefinite threat of something terrible. For I think there can be little doubt that the indefinite writ, the quibusdam certis de causis, was the older writ of the two. As to the date when each writ first made its appearance, it is difficult to find any positive evidence.

d. *The remedy asked for.*

The fourth essential of a Chancery Proceeding is that the plaintiff prays for a remedy from the Chancellor. This is frequently in very general terms, especially in early cases. Sometimes the plaintiff evidently did not know what remedy to ask for, or whether he had any at all, but left it entirely to the Chancellor's superior wisdom and good graces. Thus in Case 58 the plaintiff asks for 'such a writ as to you shall seem reasonable in this case.'—*Select Cases in Chancery*, 10 *Selden Society, Introduction, p.* xii.

Fundamental Theories and Principles of Equity.

From time immemorial it was one of the prerogatives of the king to administer justice to his subjects. He could do this personally, or delegate the power to others, at his option. As his prerogative did not extend to legislation, he was bound to administer justice according to law, and not according to his own ideas of right,—still less according to his own fancy or caprice. It seems to have been a part of his prerogative, however, to adopt such a system of procedure as he saw fit, at least in the absence of any legislation to the contrary. At an early period it became the established course for the king to delegate his judicial power in civil causes to judges appointed by him for the purpose. This delegation, however, was not general, but was made specifically in each case, *i. e.*, when the king was applied to for the redress of some grievance, he gave the complainant a writ, requiring the party complained of to appear before the king's judges, and authorizing the latter to take cognizance of the case. The writ briefly stated the nature of the complaint; and, if the case turned out to be different from what the writ stated, the judges would have no authority to proceed, and the plaintiff failed. Originally, it would seem, the judges were authorized to mould their procedure into such form as they saw fit; but this power was in a great measure lost in process of time, the fundamental principles of their procedure becoming so fixed by long use that they were binding upon the judges as a part of the law of the land.

Sometimes it would happen that a case would be presented to which no existing writ was adapted, and yet the case would be one which demanded a remedy of some kind. In that event, the king must either take direct cognizance of the case, or he must have a new writ framed expressly for it. For reasons which it is not necessary here to inquire into, the latter course became impracticable at an early day, and the former alone remained. So also cases arose in which it was useless to give the complainant a writ, since the king's judges, from the nature of their procedure, could either afford no remedy, or only an inadequate one. Of such cases, therefore, the king alone could take effective cognizance.

It was in this way that the jurisdiction in equity arose. It consisted of that portion of the king's judicial prerogative in civil causes which he had retained in his own hands, having never delegated it to his judges by writ. It is true, the king did not take cognizance of equity cases personally, any more than he did of common-law cases, but in legal contemplation he did: and the chancellor differed from the common-law judges in this particular among others, namely, that he exercised the king's prerogative directly, his judicial acts deriving their efficacy from the fact that, in legal effect, they were the acts of the king, the chancellor being little more than the king's secretary. This is the explanation of several peculiarities of procedure in chancery. Thus, all writs which are issued in the prosecution or defence of a suit in chan-

cery must be sealed with the king's great seal, and are tested in the king's name, no matter how slight or unimportant the occasion upon which they are to be used: and notwithstanding the serious expense, delays, and inconvenience which are caused by what seems upon its face to be a useless form. The common-law courts have seals of their own, and when they have once received authority from the king, by writ under the great seal, to take cognizance of an action, all further writs which are necessary in its prosecution or defence are issued under their own seal, and are tested by their chief justice. But the chancellor has never had a seal of his own, and he cannot even compel a witness to appear and testify, except by a writ under the great seal. The chancellor also has to enforce his authority by writ in cases where, upon ordinary principles, a writ is neither necessary nor proper. Thus, all the decisions of the chancellor, upon questions brought before him, are embodied in orders or decrees, which are formally drawn up in writing, and which, as will be seen presently, always direct the party against whom they are made to do or not to do something. The normal mode of enforcing such orders and decrees would be to serve them upon the parties respectively by whom they are to be performed (generally by showing the original and delivering a copy), and, if they refuse obedience, to punish them for contempt of the authority of the court. But in chancery the mode is, to issue a writ under the great seal, incorporating in it the tenor or the substance of the order or decree, and commanding the party to perform it; and, if he refuses obedience to the writ, he is guilty of a contempt, not to the chancellor, but to the king; and hence, when the chancellor proceeds to punish him for his contempt, he adopts a mode of proceeding unknown to any mere court of justice, the delinquent being treated as a rebel and contemner of the king's sovereignty. Finally common-law judges can exercise their authority only when holding a court, the delegation of authority being to the court, and not to the judges individually; and this has the effect of limiting the action of common-law courts to term time, they having no authority to sit in vacation. But as the chancellor represents the king, his authority is personal, and may be exercised at any place within the kingdom, and equally in term time or vacation. It is commonly said that the court of chancery is always open; but in truth the chancellor does not hold a court in the strict sense of the term, and hence his sessions are not formally opened and adjourned, like those of common-law courts.

Bearing in mind that the king, as well as the common-law judges, was bound to administer justice according to law; that he differed from the latter in being free to adopt such a system of procedure as he thought fit; and that the necessity for resorting to the king's prerogative jurisdiction arose from the inability of the common-law courts to afford an adequate remedy for all existing rights,—it follows that equity originally differed from the common law in little else than in having a different system of procedure, and thus affording different remedies, and, in particular, it follows that the court of chancery did not administer a different system of law from the common-law courts, as the ecclesiastical and admiralty courts did. What, then, were the defects of the common-law procedure which gave rise to equity, and how were these defects remedied by the system of procedure adopted in chancery?

The common-law procedure is founded upon the theory that the parties to an action owe no obedience to the court. Accordingly, a common-law court never redresses a wrong done to a plaintiff by laying a command upon a defendant. Thus, if a defendant in an action detains property belonging to the

plaintiff, the court gives judgment that the plaintiff recover it, and thereupon issues a writ of execution directed to the sheriff, and commanding him to put the plaintiff in possession of the property, if real; if personal, to take it and deliver it to the plaintiff. But in the latter case, if the sheriff cannot find the property, a court of common law can do nothing for the plaintiff except give him damages. The defendant may know where the property is, having purposely removed it or concealed it from the sheriff; still he cannot be ordered to deliver it to the plaintiff. So, if a defendant has refused to perform a contract, a court of common law can only give the plaintiff damages, no matter how important to the latter actual performance may be. So a defendant may threaten to do the plaintiff an irreparable injury, or he may be actually doing it, and repeating it from day to day, yet a court of common law cannot prevent it. It can only give the plaintiff damages after the injury is committed. So the power of a common-law court to enforce a judgment for the recovery of money begins and ends with issuing a writ of execution to the sheriff, commanding him to seize the property of the judgment-debtor and apply it to the satisfaction of the judgment. If the judgment-debtor has no property that is capable of seizure, or none that the sheriff can find, the judgment must remain unsatisfied, for anything the court rendering it can do, though the judgment-debtor have millions in *choses en action* or in shares in incorporated companies. So if A has received property to hold in trust for B, the latter can have no remedy at law; for A is confessedly the owner of the property, and a court of law cannot compel him to perform the trust. Nor can a court of law make a division or partition of property among several co-owners, though it formerly attempted to do so in case of real estate. To do this successfully in any but the simplest cases, it is necessary that the court should assume control over the parties. In one instance courts of law seem formerly to have departed from their principles, namely, in entertaining the action of account, *i. e.*, an action to compel the rendering of an account; but their methods were so ill adapted to such a purpose that this action long since became obsolete.

The power of common-law courts is subject to another important limitation, intimately connected with the foregoing, if it does not indeed result directly from it. They cannot deal with a controversy to which there are more than two parties or two sets of parties. The contract of suretyship will serve as an illustration of this. To such a contract, in its simplest form, there are three parties, viz., the creditor, the principal debtor, and the surety; and no two of them are united either in interest or obligation. No more than two of them, therefore, can be parties to any action at law. If there are several sureties, the case is much worse: for though they may all be sued at law by the creditor, if their obligations be joint, yet, in any controversy with the debtor in which they are all interested, the law can afford no remedy; for only one of them can be a party to an action by or against the debtor. In other words, a court of law can only entertain a controversy between the debtor and one surety. So, if a controversy arises between the several sureties, a court of law is equally powerless, as it can only entertain a controversy between two of them.

It may be added that the jurisdiction of a court of law is contentious only, that is, it is strictly limited to deciding controversies.

These defects in the common-law procedure could be effectually remedied in only one way, namely, by adopting a procedure founded upon the principle of compelling litigants to do whatever the chancellor decided that by law they ought to do. Such a system was furnished by the ecclesiastical courts. It

was not only their constant practice to adjudicate upon the duties of litigants, and to compel performance thereof specifically; but, in consequence of their having no jurisdiction over property, it was their only mode of administering justice. It is true that they were equally without jurisdiction over the bodies of litigants, and had to confine themselves to punishments of a spiritual nature; but, when they had exhausted those without effect, they were entitled to apply to the king for a writ of *capias*, upon which the delinquent was arrested and imprisoned until he submitted. In this mode, therefore, their whole judicial power was exercised. It mattered not whether a party was to be required to take some necessary step in a suit, or to pay a sum of money found to be due to his adversary, or to pay costs, or to perform some more specific duty to his adversary, or to refrain from committing some wrong against him: in either case he was first ordered by the court to do or refrain from doing the thing in question; if he refused obedience he was pronounced contumacious, and excommunicated; and lastly his excommunication was *signified* to the king, and thereupon a writ *de excommunicato capiendo* was issued, upon which he was arrested by the sheriff and imprisoned in the county jail.

This system was adopted literally by the chancellor, *mutatis mutandis*, in the exercise of the prerogative jurisdiction; and it has continued in use without change to this day. Indeed, as a rule, the chancellor, like the ecclesiastical courts, had no jurisdiction *in rem*, and hence could only enforce his orders and decrees by process *in personam;* though whether this was a cause or a consequence of his adopting the ecclesiastical procedure may be doubtful. To some extent, however, the chancellor has asserted and maintained the right to proceed *in rem*. Thus, when all process against the person has been exhausted without effect, he will issue a writ of sequestration against the property of the delinquent. So when a defendant has been decreed to deliver possession of land to the plaintiff, as a last resort a writ of assistance will be issued to the sheriff to put the plaintiff in possession. But, with these exceptions, chancery exercises all its powers by process of contempt against the person.

[After all, these are scarcely exceptions to the rule that the chancellor has no jurisdiction *in rem*. When he issues and enforces a writ of sequestration, or a writ of assistance, he merely exerts physical power over the possession of property, and this he can do, though he have no jurisdiction whatever *in rem*. A court which possesses that jurisdiction can by its judgment or decree take the title to property out of one person and put it in another. Thus, courts of admiralty are in the constant habit of ordering the sale of property against which proceedings *in rem* are taken, and when property is thus sold, all existing titles to it are extinguished, and the entire ownership of it becomes vested in the purchaser. So when the property of a judgment-debtor is seized and sold to satisfy the judgment, the title of the judgment-debtor is as effectively transferred to the purchaser as if the sale had been made by the judgment-debtor himself. So when common-law courts were in the habit of entertaining suits for the partition of land, the partition was made by the court itself without any act of the owners of the property whatever. The court first rendered judgment that partition be made (*quod partitio fiat*); whereupon a writ was issued to the sheriff, directing him to make a partition of the land pursuant to the judgment, and report the same to the court. When this had been done, the court rendered another and final judgment that the partition so made remain firm and stable forever (*firma et stabilis in perpetuum teneatur*); and by force of this latter judgment each party acquired the exclusive title to the

share allotted to himself, and ceased to have any title to the shares allotted to the others. This power of creating and extinguishing titles the chancellor never had nor claimed to have, except when it was given him by statute. It is true that he frequently directed the sale of property, but it was by his control over the person of the owner that he made the sale effective, *i. e.*, when the sale had been made he compelled the owner to execute a deed pursuant to the sale; and hence, when the owner was out of the jurisdiction, or labored under any incapacity, *e. g.*, that of infancy, the chancellor was powerless. He could not even make the appointment of a new trustee effective, except by compelling the old trustee or his heir, or whoever held the legal title, to convey to the new trustee. When it became the practice to resort to chancery for the partition of land, what the chancellor really did was, first, to inquire and ascertain *how* the property should be divided, and then to compel the parties to divide accordingly by the execution of mutual conveyances. So when the chancellor undertook the settlement of a disputed boundary, he first ascertained what the true boundary line was, and then compelled the parties by mutual conveyances to establish that as the boundary line. When the chancellor placed property in the hands of a receiver, the latter acquired no title to the property, but possession merely. If he had occasion to assert a title to the property in a court of law, he had to do it in the name of the owner; and if the owner brought an action against him to recover the property, he had no defence to the action, and his only security was in the power of the chancellor to punish for contempt any one who interfered with the possession of his receiver. It is often said to have been one of the functions of the Chancellor to set aside, for fraud or other sufficient cause, judgments, awards, accounts stated, conveyances, and contracts; but this is an incorrect use of language. If a judgment had been obtained by fraud, he would enjoin the judgment-creditor from enforcing it; if an award or an account stated was infected with fraud, he would not permit it to be used against the defrauded party, either as a cause of action or as a defence to the original cause of action; if a conveyance of property was obtained by fraud, he would compel a reconveyance of it; if a written instrument purporting to constitute a contract was infected with fraud, he would, in a proper case, require it to be delivered up and cancelled; but he never did nor could set anything aside by his decree. Indeed, it may be stated broadly that a decree in chancery has not in itself (*i. e.*, independently of what may be done under it) any legal operation whatever. If a debt, whether by simple contract or by specialty, be sued for in a court of law, and judgment recovered, the original debt is merged in the judgment, and extinguished by it, and the judgment creates a new debt of a higher nature, and of which the judgment itself is conclusive evidence. But if the same debt be sued for in the court of chancery (as it frequently may be) and a decree obtained for its payment, not one of the effects before stated is produced by the decree. Undoubtedly it has often been said by chancellors that their decrees are equal to judgments at law, but that only means that they will, to the extent of their power, secure for their decrees the same advantages that judgments have by law; it does not mean that a decree is by law equal to a judgment. Again, if a claim be made the subject of an action at law, and judgment be rendered for the defendent upon the merits, the judgment is conclusive evidence that the claim was not well founded, and it will therefore furnish a perfect defence to any future action upon the same claim; but a decree in equity against the validity of a claim is never a defence to an action at law upon the same claim.

Here again, however, the chancellor will make his decrees equal to judgments so far as it is in his power to do so; and therefore a decree in chancery against a claim upon its merits will always be a defence to any future suit in chancery upon the same claim, not as destroying the claim or as proving conclusively its invalidity, but as furnishing a sufficient reason why chancery should not again take cognizance of it. Such a decree will also be (what is sometimes called) an equitable defence to any action at law upon the same claim, *i. e.*, the chancellor will enjoin the prosecution of any such action, upon the ground that the plaintiff having elected to make his claim the subject of a suit in equity, and that suit having been defended successfully upon the merits, it is not right that the defendant should be vexed again by the same claim. Accordingly, when A and B demand the same thing of C, and for that reason C, the demand being a legal one, files a bill of interpleader against A and B, and the chancellor decides that the thing demanded belongs to A, and awards it to him, he also directs a perpetual injunction to issue against B to restrain him from suing C at law for the same thing, and that is C's only protection.

Upon the whole, therefore, the weakness of the chancellor's jurisdiction is as conspicuous as its strength; its strength being that it can always command the obedience of suitors; its weakness being that it has substantially no resource beyond commanding such obedience. It should be observed, however, that, while its element of strength is necessary to the existence of the jurisdiction, its element of weakness is not. The chancellor might in the beginning, like the court of admiralty, have been clothed with the same jurisdiction *in rem* as *in personam*; but if he had been, equity would now be a very different thing from what it is, and its machinery would be very different from what it is. If the system were to be constructed anew, probably its element of weakness would be eliminated from it, and if it could be reconstructed in an enlightened manner (a thing which is not at all likely to happen), it would probably be improved. However that may be, any one who wishes to understand the English system of equity as it is, and as it has been from the beginning, must study its weakness as well as its strength.—Note to 2d edition.]

By the adoption of this system of procedure, the chancellor was not only enabled to enforce specific performance in the numerous cases where that was obviously either the sole remedy, or the only adequate one, but to give relief in many other cases in which the common-law courts were powerless. Thus the common law can only give the plaintiff, as a rule, what he was absolutely entitled to when he brought his action. If anything then remained to be done by him to perfect his right, or if more time must elapse, or some uncertain event must happen, before his right will accrue, his action must wholly fail; and he cannot even obtain a decision of the question in controversy. But as the chancellor in any event gives relief by directing and requiring the defendant to do something, there is no technical difficulty in the way of his directing the thing in question to be done at some fixed future time, or upon the happening of some event, or upon the performance of some condition on the part of the plaintiff. So he can make it a condition of giving relief that the plaintiff shall submit to do on his part whatever shall be required of him, and the plaintiff having so submitted, the decree will direct performance on his part as well as on the part of the defendant. So, too, it is immaterial to the chancellor, so far as regards his ability to deal with a controversy, how many different interests it affects, or how many different parties or sets of parties have to be brought before him; and although every party must in form be a

plaintiff or defendant, it is not necessary that any two defendants be united in interest; and if some of the defendants have the same interest as the plaintiff, it constitutes no objection; and frequently it is immaterial, in a legal sense, which one of several parties is plaintiff in the suit; for in any event the chancellor has only to direct what shall be done, if anything, by each person before him, whether plaintiff or defendant, and upon what terms and conditions, if any; and if some of the defendants require relief, either against the plaintiff or against co-defendants, which cannot be given to them as defendants, the chancellor can have them made plaintiffs by directing them to file a cross-bill. Nor is the power of the chancellor limited to deciding controversies; for if a trustee, or any person occupying a fiduciary position, refuses to perform his duties, he may be compelled to do so by bill in equity, and the necessity for such a bill may (and most frequently does) arise not from any misconduct in the trustee, but from his being in doubt as to what his duty requires of him, and from his needing the assistance and protection of the court; in which case he may file the bill himself instead of waiting to have it filed against him. And when such a bill is filed, either by or against the trustee, the plaintiff is entitled thereafter to have the entire trust administered under the direction of the court. In this way, a great amount of administrative business is disposed of by the chancellor; in England, indeed, it is in this way that the estates of deceased persons are settled and wound up, executors and administrators being *quasi* trustees. Again, it often happens that the court can do a thing itself more easily and effectively than it can compel it to be done by the party concerned; and when that is so, there is no objection in principle to the court's assuming the duty. In this way, the chancellor exercises an important administrative jurisdiction through the instrumentality of receivers. Thus, whenever it becomes necessary or proper for the chancellor to assume temporary control over the possession, care, and management of property, he may do so by placing it in the hands of a receiver, instead of assuming control over the party in possession.

Of course, however, it must not be supposed that equity in modern times is simply a different system of remedies from those administered in courts of law; for there are many extensive doctrines in equity, and some whole branches of law, which are unknown to the common-law courts. Indeed, it may be said without impropriety that equity is a great legal system, which has grown up by the side of the common law, and which, while consistent with the latter, is in great measure independent of it. But what should be clearly understood is, that the whole of this growth has its root in the system of remedies adopted. It has often been said that it is the office of chancery to mitigate the rigor of the common law, to supply its deficiencies, to relieve against its technical rules, and to decide controversies according to equity and good conscience: but it is because of its system of remedies that it is enabled to do this. Thus, the whole system of trusts has grown up in equity, while it is unknown at common law, because the chancellor is able to compel the performance of trusts, and a court of common law is not. So when the estate of a mortgagee has become absolute by the terms of the mortgage, it is idle for a court of law to inquire whether he is bound in justice to reconvey to the mortgagor upon receiving his debt and interest; but such an inquiry is very material in a court of equity, for, if the conclusion reached is that he is so bound, the court will compel him to do it. This is the origin of the equitable doctrine that, as a mortgage is designed as a security merely, the mortgagee is entitled to no more than his

debt and interest, although the debt was not paid at the time specified in the mortgage; and upon this foundation all suits for the redemption of mortgages rest. But as it would be unjust to compel the mortgagee to wait the pleasure of the mortgagor, the latter will be compelled either to pay the money, or to relinquish all claim to the mortgaged property, within a time fixed by the court; and hence foreclosure suits arise. In this way, nearly the whole subject of mortgages has passed into equity. So if a father, who owns Blackacre in fee and Whiteacre in tail, devises the former to his eldest son, and the latter to his younger son, the former will take them both at law; for he is both the heir at law and the heir in tail of his father, and as such, both Blackacre and Whiteacre have descended to him. As to Blackacre, the father has not attempted to interrupt the course of descent; as to Whiteacre, he has made the attempt, but he has not succeeded. But a court of equity will say the father clearly did not mean that his eldest son should have both Blackacre and Whiteacre, and hence it will put him to his election, *i. e.*, if he insists upon keeping Whiteacre, it will compel him to give the younger son an equivalent out of Blackacre. Hence, the doctrine of election is a purely equitable one. So the rule that whatever ought to have been done will be considered as having been done, is wholly the creature of equity, it being founded upon the principle that, as a court of equity would have compelled performance of the duty, it will put the parties interested, so far as possible, in the same position as if it had been performed. Hence the doctrine of equitable conversion, and other doctrines of a kindred nature.—*Langdell, Summary of Equity Pleading, 2d Edit.*, 27-42.

CHAPTER II.

EQUITY JURISDICTION IS EXCLUSIVE, CONCURRENT, AUXILIARY OR SUPPLEMENTAL.[1]

Section 1. Exclusive Jurisdiction.

EMANUEL COLLEGE *v.* EVANS.

In Chancery, before Lord Keeper Coventry,[2] 1625.

[1 *Reports in Chancery* 18.][3]

That the Earl of *Huntington* seized in fee of the Mannor of *North-Cabury* with Advowson appendant, and for payment of Debts by way of Mortgage, 25 *Eliz.* made a Lease for 500 years of the said Mannor with

[1] It has occurred to me, that a reference to the mode in which the co-existing state of the law has been affected as regards each separate class of cases over which the jurisdiction of the Court of Chancery has been exercised, would furnish an intelligent and not unnatural basis for arranging the order in which each of these classes should be treated. Mr. Fonblanque, Mr. Jeremy, Sir George Cooper, and Mr. Justice Story, have, also in reference to the co-existing state of the law, ranged the jurisdiction of the Court of Chancery under the three heads of its *Exclusive*, its *Concurrent*, and its *Assistant* Jurisdiction, but I have not found that classification quite satisfactory. Practically, a complete catalogue is the great thing wanted, and I am sure that a person writing on this subject, will be excused for taking that arrangement which is most convenient to himself, provided the great object above pointed out be effected.

The above classification is irrespective of the Subjects, but looking to the jurisdiction of the Court of Chancery in that view, it will be found that the jurisdiction of the court as affecting legal rights and liabilities, has been brought into action as regards three kinds of subjects.

1. Where some specific property, real or personal, has been the subject.

2. Where no specific property has been the subject, but one or both of the parties has been under some liability, for which an action for damages might be sustained, or

3. Where there was no specific property in dispute, nor was there any right of action at law, but one of the parties has sought to establish against the other some claim in respect of which the law was silent, and to which therefore the negative state of the law would have afforded an effectual defence at law.—*Spence, Equity Jurisdiction of the Court of Chancery, pp.* 430-431.

[2] "In our Courts of Equity general rules are established as far as it has been judged the nature of things would admit, especially since the time of my Lord Keeper Coventry, who was very able and contributed a great deal towards modelling the Court of Chancery." Lord Hardwicke's letter to Lord Kames on the Principles of Equity, printed in Parkes' Chancery, Appendix, p. 508.

[3] A part of the case relating to other points has been omitted.

Appurtenances, not mentioning the Advowson by express name, with a clause of Redemption, and for advancement of Learning and Religion, of his free disposition in 28 *Eliz.* by Deed granted the said Advowson to Sir *Francis Hastings,* and others, and their Heirs, to the use of the said Earl for Life, Remainder to the Master, Fellows, &c. of the said College, and their Successors, for ever; and shortly after in the same year paid his said Debts, and for valuable Considerations the said Earl sold the said Mannor to the said Sir *Francis Hastings,* yet the Advowson was not mentioned in the said Deed of Sale, but was mentioned in the Fine; which this Court observed, and conceived thereupon, That it was purposely omitted in the Deed, for otherwise the Covenant of the said Earl had been broken; but it was put into the Fine on purpose to convey the Advowson to the said Sir *Francis Hastings,* during the Life of the said Earl only.

And this Court conceived the said Advowson being leased not by special Name, but as appendant to the Mannor, and that only by way of Counter-Security, and the Mony thereby secured but 100 *l.* and at the Time of granting the said Advowson to the said College, the said Earl took no notice of the said Lease of 500 years, as a thing of validity, for that it had been absurd in the said Grant to reserve to himself an Estate for Life after 500 years, that the said Lease was Assigned by the said Earl to *Mathew Evans* the Defendants Uncle, in Trust for the said Sir *Francis Hastings,* for securing his Purchase; and this Court conceived the said Lease being but a security, and that Mony paid, the said Lease had been void, as well against the said College, as against any other; and though the Mony not paid at the day but afterwards, the said Lease ought to be void in Equity, as well as on a legal Payment, it had been void in Law against them.[1]

ROSCARRICK *v.* BARTON (1672), 1 *Cases in Chancery* 217, 219.—CHIEF JUSTICE HALE. By the growth of equity on equity, the heart of the common law is eaten out, and legal settlements are destroyed; and was of opinion, there is no colour for a decree. In 14 R. II. the parlia-

[1] Spence, Equity Jurisprudence, vol. 1, p. 603, says, citing this case: "At length, in the reign of Charles I, it was established, that in all cases of mortgage where the money was actually paid or tendered, though after the [law] day the mortgage should be considered as redeemed in equity, as it would have been at law on payment before the day; and from that time bills began to be filed by mortgagees for the extinction or foreclosure of this equity, unless payment were made by a short day to be named. But length of time might be set up as a bar to redemption."

"ITEM, if a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c., 40 pounds of money, that then the feoffor may reenter, &c., in this case the feoffee is called tenant in mortgage, which is as much as to say, in French, as mortgage, and in Latin *mortuum vadium.*

ment would not admit of redemption; but now there is another settled course; as far as the line is given, man will go; and if an hundred years are given man will go so far, and we know not whether we shall go. An equity of redemption is transferable from one to another now, and yet at common law if he that had the equity made a feoffment, or levied a fine, he had extinguished his equity at law; and it hath gone far enough already, and we will go no further than precedents in the matter of equity of redemption, which hath too much favour already; and concluded there should be no decree for the plaintiff in respect of the antiquity, and if he will redeem, he must come in time. It is but just to foreclose for not coming in time. It is just to deny redemption if he come not in time. And a decree to foreclose a tenant in tail shall bind his issue in an equity of redemption, because that is a right set up only in a court of equity: and so may be here extinguished; and the estate moved from Charles to the mortgagee, and not from the plaintiff; and Charles was the visible possessor and owner. And it is a great sore, that mortgagees are but bailiffs; and the limitation to Chaumond was but voluntary, and so the plaintiff's pretence is not to be supported against a purchaser, for so a mortgagee is; and here it is made absolute by the decree; and if there be divers remainders of the equity, there is no reason to make them all parties.[1]

CASBORNE *v.* SCARFE (1737), 1 *Atkyns* 603, 605.[2]—*Lord Chancellor* [Hardwicke]: This question depends on two considerations.

And it seemeth, that the cause why it is called mortgage is, for that is doubtful whether the feoffer will pay at the day limited such sum or not; and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him forever, and so dead to him upon condition, etc. And if he doth pay the money, then the pledge is dead to the tenant, etc." Co. Litt. 205a.

"As to the origin of mortgages: From what is said of them in this chapter, it appears that they were introduced less upon the model of the Roman *pignus* or *hypotheca* than upon the common-law doctrine of condition." Hargrave's Note.

[1] This outburst of Chief Justice Hale is said to have been caused by the remark of Lord Keeper Finch in *Bacon* v. *Bacon* (1639-40), *Toth.* 133, that "the court will relieve a mortgage to the tenth generation, though the purchaser had no notice." In *King* v. *Suddis* (1801) 1 *East* 314, Lord Kenyon called Sir Matthew Hale "one of the greatest and best men who ever sat in judgment."

[2] *S. S.* II *White and Tudor's Leading Cases in Equity, Pt.* 2, *p.* * 1035, *with notes.*

In *Goodlittle* v. *Otway* (1797) 7 T. R. 416, Lord Kenyon said of Hardwicke: "I am old enough to remember that great judge, though but for a short time before he left the Court of Chancery; and the knowledge of those

First, What sort of interest an equity of redemption is considered to be in this court?

First, An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin; the person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.

By a devise of all lands, tenements and hereditaments, a mortgage in fee shall not pass unless the equity of redemption be foreclosed; and if, after such devise made, a foreclosure is had, yet such estate shall not pass by those general words of lands, tenements, and hereditaments, because a foreclosure is considered as a new purchase of the land.

The interest of the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore must remain in the mortgagor. A. devises his estate and after makes a mortgage in fee, though that is a total revocation in law, yet in this court it is a revocation *pro tanto* only.

It is certain the mortgagee is not barely a trustee to the mortgagor, but to some purposes, *videlicet*, with regard to the inheritance he certainly is, till a foreclosure.

PHELPS *v.* SAGE.

SUPREME COURT OF ERRORS, CONNECTICUT, 1805.

[2 *Day* 151.]

This was an action of ejectment; to which the general issue was pleaded.[1]

In the further progress of the trial, it appeared, that the plaintiff claimed under a mortgage deed, and the defendant under a subsequent absolute deed, from the same person. In order to shew, that the plaintiff's title was divested, the defendant offered to prove, that after the expiration of the law-day, the whole mortgage money was paid to the plaintiff's satisfaction. To the admission of this evidence the plaintiff

who lived before me only fortified me in the opinion I formed of him, that his knowledge of the law was most extraordinary; he had been trained up very early in the pursuit, he had great industry and abilities, and was, in short, a consummate master of the profession."

Lord Eldon put Hardwicke above his doubts: "There is the authority of Lord Hardwicke upon the point, which would weigh down the most considerable doubt that I could be disposed to entertain." *Ex parte Ruffin* (1801) 6 *Vesey*, 126.

[1] A part of the case relating to the question of estoppel by a void deed has been omitted.

objected, alleging that no payment of the money, or settlement of the debts, after the law-day had expired, could divest the plaintiff's title, and revest it in the mortgagor, but that the remedy was by application to a court of chancery. On this principle, the Court rejected the evidence. To the ruling of the Court, in both instances, the defendant filed his bill of exceptions.

Smith, (of Woodbury,) for the plaintiff in error.

The Superior Court erred, by rejecting our testimony, to shew, that the mortgage debt was paid, to the full satisfaction of the mortgagee. By the acceptance of the money, he waived any advantage, which he might have had by the lapse of the law-day.

Daggett, for the defendant in error.

The payment of the mortgage money, after the law-day, could only give a right to redeem. The legal title was in the plaintiff, and would there remain until she should transfer it to another. The only relief for the mortgagor is in chancery. Infinite mischiefs would accrue, if the jury were permitted, on the general issue, to settle the business between the mortgagor and mortgagee.

By the COURT (unanimously). The judgment was affirmed.[1]

PARSONS *v.* WELLES.

SUPREME JUDICIAL COURT, 1821.

[17 *Massachusetts* 419.][2]

Trial was had here on the general issue, before *Wilde* J. February term 1819.—The facts stated in the report of the judge, and those appearing by the papers referred to in that report, are briefly these.—In January 1800, *Ellis,* who was the former owner of the demanded premises, conveyed a part thereof in fee and in mortgage to one *William Cabot,* and in the following March conveyed, in like manner, another part thereof to one *James Otis:* after which he made and executed the two mortgage deeds, under which the demandant claims; one dated in October 1804, and the other in December 1805. These deeds to the demandant included the lands mortgaged to *Cabot* and *Otis,* and some other lands. The deeds to *Cabot* and *Otis* were duly acknowledged, and

[1] "Now, it is well settled, in this state, that if the mortgagor pays the debt after the law day has expired, he cannot sustain an action at law against the mortgagee for the possession, nor can anyone claiming title under him. He must first get in the legal title." *Per Waite, J. Doton v. Russell* (1845) 17 *Conn.* 146, 154.

[2] Parts of the opinion discussing the rights of a second mortgagee, the effect of particular Massachusetts Statutes, and the powers of the mortgagee to harass the mortgagor, have been omitted.

recorded in the registry of deeds, previously to the execution of the mortgages to the demandant; and have since been duly assigned to the present tenants.

Ellis not having paid the money, according to his stipulations in his deeds to *Cabot* and *Otis,* they severally instituted suits against him, to recover possession of the lands mortgaged to them; and judgments being recovered by them, possession was duly delivered to them, according to their respective rights, by virtue of writs of *habere facias possessionem.*

Evidence was offered by the demandant, to prove that after possession was thus delivered, *Ellis* paid the amount due on both those mortgages. The tenants objected to the admission of this evidence, on the ground that payment alone, after the mortgagee's estate had become absolute, and after judgment for possession, and entry after condition broken, was not sufficient to defeat their legal estate.—The judge overruled this objection, not, as he states, because he thought it unfounded; but for the purpose of settling the question of fact as to the payment, and to prevent a new trial in case the court should be of opinion that such evidence was admissible.

A verdict was returned for the demandant, which was to be set aside and a new trial granted, if the evidence was inadmissible; otherwise judgment was to be rendered on the verdict.

WILDE J. delivered the opinion of the court.—The question of law arising in this case, and which is now to be determined, is, whether the evidence of the payment by *Ellis* was properly admitted:—or in other words, whether, after failure by the mortgagor to pay the amount due on the mortgage, and judgment recovered and possession received by the mortgagee, the payment of the principal, interest and costs does *ipso facto* defeat the estate of the mortgagee, so that the mortgagor may lawfully enter, or maintain ejectment for the recovery of possession.—This is a question of considerable difficulty, and leads to the consideration of points, upon which learned judges and jurists have held different opinions. This difference of opinion has probably arisen in part from the peculiar nature of the contract of mortgage; but principally, I apprehend, from a disposition, in most of the judges of late years, to adopt the rules of equity; and to combine them in practice, as far as possible, with the principles and rules of the common law.

The antient doctrine of the common law, in respect to mortgages, was plain and well understood. By a conveyance, by way of mortgage in fee, all the mortgagor's title passes to the mortgagee; subject however to be defeated by the performance of the condition. But if the condition be not strictly performed by the mortgagor, the estate of the mortgagee becomes absolute; no right remaining to the mortgagor afterwards to redeem. "If he," (the mortgagor) says *Littleton,* § 332, "doth not pay, "then the land, which is put in pledge upon condition for the payment "of the money, is taken from him forever, and so dead to him upon

"condition &c. And if he doth pay the money, then the pledge is dead "as to the mortgagee." "In case of failure," (to perform the condition) says *Blackstone,* "the mortgagee may enter and take possession without "any possibility *at law* of being afterwards evicted by the mortgagor." 2 *Comm.* 158. So that a mortgage, although a pledge at first, becomes an absolute interest, unless redeemed at the time limited for the payment of the money, or other performance of the condition. If it be not literally performed by payment of the money at the day, the estate becomes subject to the dower of the wife of the mortgagee, and to all other incumbrances by him; although the money should be afterwards paid, and the estate reconveyed to the mortgagor.—*Powell on Mortgages* 9, 10.

To avoid the inconvenience and injustice, to which the mortgagor might be thus exposed, it has been usual in *England* to substitute mortgages for a long term of years, for mortgages in fee: and this practice prevailed very generally, until the courts of equity interferred; who held that the power of redemption was an equitable right, inherent in the land, and binding all persons, whether claiming in the *per,* that is, by the act of the mortgagee, as tenant in dower, by statute staple, *elegit* &c.; or in the *post,* that is, by the act of the law, as tenant by the curtesy, and the lord by escheat.—*Powell* 11.—*Cro. Car.* 191.—*Hard.* 465, 469.

But although the legal estate is absolute at law in the mortgagee after forfeiture, yet the courts of equity, after their jurisdiction became well established in *England,* thought that conscience and equity required them to break in upon the common law, and to grant relief by permitting the mortgagor, at any reasonable time, to redeem. Still however the courts of equity admitted the legal estate to be in the mortgagee; but they considered him as the *trustee* of the mortgagor until a foreclosure: thereby turning the *mortuum* into a kind of *vivum vadium.* They however allowed the mortgagee to call upon the mortgagor to redeem *presently,* or in default thereof to be forever foreclosed. And they generally refused to interfere in favour of the mortgagor, after twenty years' possession by the mortgagee. If there were no foreclosure, nor such length of possession by the mortgagee, the mortgagor was considered the true owner, a mortgage being considered as a mere security for the debt, even after forfeiture: and of course the discharge of the debt was held to be a determination of the interest of the mortgagee, and of all claiming under him. 1 *Vern.* 361.—*Powell,* 141, 142.—*Prec. Chanc.* 99.—*Bernard.* 93.—1 *Ves.* 361.

It cannot be denied, that these principles and rules of the courts of equity have had a favourable operation in the administration of justice, and have afforded relief where, by the strict principles of the common law, the mortgagor was without remedy. They were conformable to the spirit of the mortgage contract, and it is not surprising that they should have gained some footing in the courts of common law. It may be doubted however, whether in some particulars they have not been adopted

to an extent, inconsistent with the established rules of the common law. In the case of *Martin* vs. *Mowlin*, 2 *Burr.* 978, lord *Mansfield* is reported to have said, that "a mortgage is a charge upon the land; and whatever "would give the money, will carry the estate in the land along with it, "to every purpose. The estate in the land is the same thing as the "money due upon it. It will be liable to debts; it will go to executors; "it will pass by a will not made and executed with the solemnities re- "quired by the statute of frauds. The assignment of the debt, or for- "giving it, will draw the land after it, as a consequence: nay, it would "do it, though the debt were forgiven only by parole; for the right to the "land would follow, notwithstanding the statute of frauds."

No authorities are cited in support of these remarks, and it seems to me extremely difficult to reconcile some of them with well established principles of law, or with the true intention of the statute of frauds. Judge *Trowbridge* was of opinion, that they were accompanied with some restrictions, which the reporter omitted to notice: because he acknowledges, in his preface, that he did not always take down the restrictions, with which the speaker might qualify a proposition, to guard against its being understood universally, or in too large a sense. See 8 *Mass. Rep.* 558. This appears to be probable, for it is impossible, as it seems to me, to suppose that lord *Mansfield* meant to assert that "the estate in the land is the same thing as the money due upon it," without some qualification of the expression. This would confound all our notions, and break down every distinction between real and personal estate; between a title in land and choses in action; between mortgages in fee and mortgages for a term; and between mortgages of land and mortgages of goods.

Probably lord *Mansfield* intended to say nothing more than that the estate of the mortgagee is worth no more than the debt, and is dependent upon it; that the discharge of the debt, at the time stipulated for payment, would defeat the mortgagee's estate; and even payment afterwards would have the same effect, by the aid of the court of chancery: or without such aid, by virtue of the statute of 7 *Geo.* 2, *c.* 20, which provides that the mortgagee shall maintain no ejectment, after payment or tender by the mortgagor, of principal, interest and costs. All this would be true, and in some measure justify the expression imputed to lord *Mansfield;* which, without some such restriction or qualification, cannot, I think, be held for law.

Nor can it be true, as Judge *Trowbridge* has shewn, by very cogent arguments, "that the assignment of the debt will draw the land after it, as a consequence," to every purpose. It can only be so by the aid of a court of equity. In a court of equity the debt is the principal, and the mortgage is the accessory. And it is there held that, as the mortgagee holds the estate in trust for the mortgagor; so when the debt is assigned, he becomes a trustee for the benefit of the person having an interest in the debt. *Omne principale trahit ad se accessorium.* This too was one of

the grounds suggested by judge *Spencer,* for the opinion in the case of *Green* vs. *Hart,* 1 *Johns.* 580, in which it was held that the transfer of a note, secured by mortgage, being in writing, the mere delivery of the mortgage security was a sufficient assignment. It is true that judge *Spencer* remarks, that "mortgages are not now considered as conveyances of lands, within the statute of frauds." I know that this opinion has prevailed in courts of equity; but I have not been able to find any decided case, to support it at law: and it appears to me against the letter and intent of the statute.

But however this may be, it can have but little bearing on the point in question. It is important only, so far as it may shew the nature and quality of an estate by mortgage.

The question now to be decided is, what is the remedy for the mortgagor, after payment of the debt, if the mortgagee, having entered for condition broken, refuses to relinquish the possession. And this court are all of opinion, that it is by a bill in equity, and that this is the only remedy. This was the doctrine held by the court in the case of *Hill* vs. *Payson & al.* 3 *Mass. Rep.* 560; and it has been frequently so ruled at *nisi prius.* It is a doctrine, which is well supported by the principles of the common law, as I think I have shewn: and it is strongly implied, if not expressly declared, in all the statutes relating to the subject.

The remedy thus provided is by a bill in equity; and the courts are directed, in such cases, to enter up judgment agreeably to equity and good conscience; and by the statute last referred to, they are authorized to adjudge and determine what shall be a reasonable and equitable performance of the condition of the deed. If the mortgagee has made disbursements for repairs &c. above the amount of the rents and profits, the court is to make the computation. The court also is to judge of the evidence of payment, and may decide the case without the intervention of a jury: all of which provisions are inconsistent with the forms of proceeding in real actions.

Thus has stood the law of *Massachusetts* for more than a century. And whatever doubts may remain as to the legal estate of the mortgagee in certain cases, the remedy for the mortgagor seems to be sufficiently plain. It is an adequate and convenient remedy, and well adapted to the great end of all judicial proceedings, the doing of impartial justice to all parties. For while, on the one hand, it moderates the rigour of the common law for the benefit of the mortgagor; it compels him, on the other hand, to perform whatever justice and equity may require, for the benefit of the mortgagee. It is as beneficial to the mortgagor as a suit at law, and may sometimes be more so; for if the evidence of payment be doubtful, the mortgagee may be compelled to answer under oath to the fact.

It is certainly more beneficial to the mortgagee; for it compels the mortgagor, when he applies for equity, to do equity. If ejectment would lie for the mortgagor, upon payment of the debt, the mortgagee

would have no remedy, to recover any disbursements, made by him for repairs; for his right to demand these depends, either upon the statute, or the rules of equity. They are unknown to the common law, which considers the mortgagee as the absolute owner.

Some other questions have been argued, which it is now unnecessary to decide.—It is the opinion of the court that the demandant is entitled to judgment for the lands, which were not included in the mortgages to *Cabot* and *Otis,* and not for the other parcels demanded.

ORD *v.* JOHNSTON.

IN CHANCERY, BEFORE VICE CHANCELLOR STUART, 1855.

[1 *Jurist, New Series,* 1063.]

The bill in this case alleged that the plaintiff and the defendants entered into an agreement, whereby the defendants were to be appointed solicitors for a certain railway company and were to divide the fees and income resulting from the solicitorship with the plaintiffs.

The prayer of the bill was that the aforesaid agreement might be declared; for specific performance of the agreement for an account and payment of what might be found to be due; for a receiver and an injunction to restrain the getting in and receiving outstanding monies; and for further relief.

The defendants' plea having been overruled, they answered denying breach of the agreement.[1]

Sir J. STUART, V. C., said—This is a bill of a very unusual kind, and there are palpable objections to the relief sought by the plaintiff, both in point of form and in point of substance. These objections seem to me to be insurmountable. In point of form, the bill asks in technical language for the specific performance of an agreement between the plaintiff and the defendants of the 8th October, 1844. It asks for the specific performance of the agreement by asking an account of the profits derived by the defendants from a certain employment, in which profits, according to the terms of that agreement, the plaintiff says he was entitled to share in certain proportions. The jurisdiction of specific performance is one which seems to me to be wholly inapplicable to such a case as this. It is a jurisdiction which is always said to be discretionary in the Court. It is a jurisdiction assumed by this Court for the more perfect administration of justice—for giving to persons having a right under an agreement the very specific thing according to the provisions of the agreement, and is intended to give more effectual relief in the case to which it applies; because, according to proceedings of Courts of law upon the breach of

[1] A shortened statement of facts is substituted for that of the report.

an agreement, what a Court of law does is to give compensation in money, which shall amount to an equivalent to that which the agreement had stipulated should be performed.[1] The whole scope and object of this bill are for a purely money demand; and it is admitted by the plaintiff's counsel during their struggle against the very obvious objections to this bill with which they have had to contend, that if the mere amount of profits was ascertained, they would be entitled to recover that amount by an action at law; shewing that all that is asked from this Court in the shape of relief under the jurisdiction of specific performance is a compensation in money on the footing of an account.[2]

Sir J. STUART, V. C.—Order that, the defendants not asking for costs, the bill be dismissed.

SECTION 2. CONCURRENT JURISDICTION.

PETER *v.* RICH.

IN CHANCERY, 1630.

[1 *Reports in Chancery* 34.]

That the Plaintiff and Defendant with one *Southcot* and *Grimes* became bound to the Lord *Ruffel* in two Bonds of 1600 *l.* apiece for payment of 800 *l.*, 100 *l.* being Purchase Mony, and the Plaintiff and Defendant entred into two Counterbonds to the said *Southcot* for his Indempnity, and the first Bond of 800 *l.* was paid, and the Plaintiff and Defendants *Richard Sheppard* came to account, upon which the Plaintiff appeared to have paid all his part of the said Purchase Mony save 40 *l.* for which the Plaintiff gave the Defendant *Rich* alone a Bond of 80 *l.* and thereupon was to be freed by the said Defendants of the 800 *l.* Bond. and was to give over the said Purchase wholly unto them; yet notwithstanding 100 *l.* of the said Purchase Mony being not paid, the Plaintiff was compelled to pay the same, being formerly bound with the Defendants in the said Bond of 1600 *l.* together with 5 *l.* Interest thereof, which said 105 *l.* this Court conceived ought to have been paid by the

[1] The balance of the opinion relating to the doctrine of mutuality and discussing the bill as one to account for personal profits, has been omitted.

[2] "I am of opinion that, inasmuch as this Bill prays a delivery of the Certificates which would constitute the Plaintiff the Proprietor of a certain quantity of Stock, the Bill in Equity will hold: because a Court of Law could not give the Property, but could only give a remedy in Damages, the beneficial effect of which must depend upon the personal responsibility of the Party." *Per Sir John Leach in Doloret v. Rothschild* (1823) 1 *S.* & *S.* 590, 598.

said *Sheppard* as the Residue of his part of the said Purchase Mony, but the said *Sheppard* being insolvent, the said 105 *l.* in the Opinion of this Court ought to be equally paid and born by the Plaintiff and Defendant *Rich,* and decreed accordingly.[1]

HOLE *v.* HARRISON.

IN CHANCERY, 1676.

[1 *Cases in Chancery* 246.]

Hole, Harrison and S. were bound in a recognizance to the chamberlain of London. The plaintiff Harrison was sued thereon, and paid the whole money, and now sued Hole, who was bound with him for contribution. Hole, Harrison and S. being all bound, and J. H. was dead insolvent, and S. was run away. The question was in what proportion the contribution should be, viz. of a third or moiety? Decreed a moiety, for S. is insolvent.[2]

COWELL *v.* EDWARDS.

COURT OF COMMON PLEAS, 1800.

[2 *Bosanquet and Puller* 268.]

Indebitatus assumpsit for money paid.

John Cowell the plaintiff's intestate having entered into a joint and several bond with seven other persons, two of whom were principals and the five others as well as himself sureties, was together with his co-sureties called upon by the obligees to pay the sum engaged for; the defendant and two of the other sureties paid each a part of that sum,

[1] In Hyde v. Tracy (1807) 2 Day 491, 494, Daggett and Goddard, counsel, received a judgment on the following statement of principle: "Chancery interferes not merely where there can be no remedy at law, but where such remedy under all the circumstances of the case, will not meet its exigencies. In this case it might ruin the petitioner, to pay the whole, and then go to law for a contribution. In Great Britain it is the constant practice to go into chancery to obtain a contribution."

[2] "The plaintiff has paid under his liability as surety, a sum of £800: there is no question but that he is entitled to contribution from each of the other four sureties, one-fifth of the amount paid, that is, if all were able to pay. But F. Green is quite unable. Therefore the plaintiff has a right to recover from the other three, one-fourth of the sum paid by him." *Per Sir R. T. Kindersley, V. C., in Hitchman* v. *Stewart* (1855) 3 *Drew.* 271.

but the present plaintiff's intestate paid the residue. Upon this the Plaintiff considering the Defendant and one of the two sureties who had already contributed as the only solvent sureties, called upon them to pay their proportion and now brought this action to recover from the defendant such a sum of money, as when added to what had been already paid by him would make up one-third of the whole sum paid to the obligees, deducting only what had been contributed by the fourth surety not called upon at this time.

The cause was tried before Lord ELDON Ch. J. at the sittings after last *Easter* term, when the plaintiff obtained a verdict for a sixth of the whole sum paid, not allowing for the sum paid by the fourth surety, with liberty to move the court to enter a verdict for the whole demand.

Lens Serjt. however on the part of the defendant obtained a rule calling upon the plaintiff to shew cause why this verdict should not be set aside altogether and a new trial be had. He took these objections; that this action could not be maintained at law by one co-surety against another; that if the action could be maintained for one-sixth of the whole sum engaged for and which, under the circumstances of the present case, he insisted was all that could be recovered from the defendant; yet, that the insolvency of the two principals and of the three other co-sureties should have been proved in order to entitle the plaintiff to the present verdict.

Shepherd and *Vaughan* Serjts. were proceeding on this day to shew cause, and cited *Deering* v. Lord *Winchelsea* (1 *Cox ch.* 318,)[1] when they were stopped by

The Court, who observed that it might now perhaps be found too late to hold that this action could not be maintained at law,[2] though neither the insolvency of the principals or of any of the co-sureties were proved; but that at all events the plaintiff could not be entitled to recover at law more than one-sixth of the whole sum paid.[2]

[1] S. C. I White and Tudor's Leading Cases in Equity, pt. 1, *100, with notes.

[2] The whole doctrine of contribution between securities originated with courts of equity. There is no express contract for contribution; the bonds, obligations, bills, or notes, created liabilities from the obligors to the obligees. The contribution between co-securities results from the maxim, that equality is equity. Proceeding on this, a surety is entitled to every remedy which the creditor has against the principal debtor; to stand in the place of the creditor; to enforce every security, and all means of payment; to have those securities transferred to him, though there was no stipulation for that. This right of a surety stands upon a principle of natural justice. The creditor may resort to principal, to either of the securities, for the whole, or to each for his proportion, and as he has that right, if he, from partiality to one surety, or for other cause, will not enforce it, the court of equity gives the same right to the other surety, and enables him to enforce it. Natural justice says that one surety having become so with other sureties, shall not have the whole debt thrown upon him by the choice of the creditor, in not resorting to remedies in his power, without having contribution from those who entered into the ob-

And Lord ELDON Ch. J. said, that he had conversed with Lord *Kenyon* upon the subject, who was also of opinion that no more than an aliquot part of the whole, regard being had to the number of co-sureties, could be recovered at law by the defendant; though if the insolvency of all the other parties were made out, a larger proportion might be recovered in a court of Equity.[1]

ligation equally with him. The obligation of co-sureties to contribute to each other, is not founded in contract between them, but stood upon a principle of equity, until that principle of equity had been so universally acknowledged, that courts of law, in modern times, have assumed jurisdiction. This jurisdiction of the courts of common law is based upon the idea, that the equitable principle had been so long and so generally acknowledged, and enforced, that persons, in placing themselves under circumstances to which it applies, may be supposed to act under the dominion of contract, implied from the universality of that principle. For a great length of time, equity exercised its jurisdiction exclusively and undividedly; the jurisdiction assumed by the courts of law is, comparatively, of very modern date; and is attended with great difficulty where there are many sureties; though simple and easy enough where there are but two sureties, one of whom brings his action against the other upon the implied assumpsit for a moiety.—*Per Bibb, C. J., Lansdale's Administrators and Heirs* v. *Cox* (1828) 7 *T. B. Mon.* (23 Ky) 401, 403.

[1] "I am of opinion that the plaintiff in this case is entitled to recover one-third of the money which he has paid on account of this annuity. In equity, indeed, in the case of Peter v. Rich 1 Cha. Ca. 34, where one of three sureties had paid a sum of money, it was held, that he was entitled to recover one moiety from another of the co-sureties, the third having become insolvent; but I think, that at law, one of three co-sureties can only recover against any one of the others an aliquot proportion of the money paid, regard being had to the number of sureties." *Per Bayley*, J. *in Brown* v. *Lee* (1827) 6 *B. & C.* 689, 697.

"Again it is an equitable principle of very general application that where one person is in the position of a mere surety for another, whether he became so by actual contract, or by operation of law, if he is compelled to pay the debt which the other in equity and justice ought to have paid, he is entitled to relief against the other, who was in fact the principal debtor. And, when courts of law, a long time since, fell in love with a part of the jurisdiction of chancery, and substituted the equitable remedy of an action of assumpsit upon the common money counts, for the more dilatory and expensive proceeding by a bill in equity in certain cases, they permitted the person thus standing in the situation of surety, who had been compelled to pay money for the principal debtor, to recover it back again from the person who ought to have paid it, in this equitable action of assumpsit as for money paid, laid out and expended for his use and benefit." *Per Walworth, Chancellor, in Hunt* v. *Amidon* (1842) 4 *Hill* 345, 348.

"It has long been settled, that, if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this Court, either upon a principle of equity, or upon contract, to call upon his co-surety for contribution; and I think, that right is properly enough stated as depending rather upon a prin-

SECTION 3. AUXILIARY JURISDICTION.

REYNOLDS *v.* BURGESS SULPHITE FIBRE CO.

IN THE SUPREME COURT OF NEW HAMPSHIRE, 1902.

[71 *New Hampshire* 332.]

BILL IN EQUITY. The bill alleges that the plaintiff has commenced an action at law against the defendants to recover damages for negligently causing the death of the plaintiff's intestate by furnishing him for use in his employment improper, unsuitable, and dangerous machinery; that on April 9, 1899, while the intestate was in the employ of the defendants, he was killed by falling against the governor of an engine; that the engine gave indications, by an unusual noise, that it was in a defective condition, and shortly afterward the strap on its connecting rod broke and caused the connecting rod to break through the outer casing with a loud crash, and thereby caused the intestate's fatal fall; that the broken pieces of the strap are in the defendants' possession; that to properly prepare the plaintiff's action at law for trial it is necessary that these pieces should be examined by the plaintiff's attorneys, and also by competent persons, with a view of testifying; and that the defendants, though requested, have refused to permit such examination. The prayer is for a discovery of the pieces of the broken strap, and for an inspection of the same by the plaintiff's attorneys and such other persons as she may desire.

The defendants filed a demurrer, which was sustained *pro forma* by

ciple of equity than upon contract: unless in this sense; that the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons, and it must be upon such a ground, of implied assumpsit, that in modern times Courts of Law have assumed jurisdiction upon this subject; a jurisdiction convenient enough in a case simple and uncomplicated; but attended with great difficulty, where the sureties are numerous; especially since it has been held, *Cowell* v. *Edward*, 2 *Bos. & Pul.*, 268, that separate actions may be brought against the different sureties for their respective quotas and proportions. It is easy to foresee the multiplicity of suits to which that leads." *Per Lord Eldon in Craythorne v. Swinburne* (1807) 14 *Ves.* 160, 164. *See also, Deering v. Earl of Winchelsea* (1787). 1 *Cox Ch.* 318, 321.

Pike, J., at the April term, 1901, of the superior court, subject to the plaintiff's exception.

Crawford D. Hening, for the plaintiff.

Chamberlin & Rich and *Orville D. Baker* (of Maine), for the defendants.

CHASE, J. Whatever may have been the fact prior to 1842 (Laws 1832, *c.* 89, *s.* 9; *Dover* v. *Portsmouth Bridge,* 17 N. H. 200), there can be no doubt that ever since that date courts of this state have possessed full equity powers in respect to discovery. R. S., *c.* 171, *s.* 6; G. S., *c.* 190, *s.* 1; G. L., *c.* 209, *s.* 1; P. S., *c.* 205, *s.* 1. In the grant of equity powers by the last-named statute, which is now in force, discovery is specially mentioned. The jurisdiction of the court over the subject generally is not questioned, but it is said that this case does not fall within the jurisdiction. In considering the reasons that have been offered in support of this position, it is necessary to have in mind the origin, purpose, and general nature of this remedy.

"The common law laid down as a maxim, *Nemo tenetur armare adversarium suum contra se;* in furtherance of which principle it generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, parol or otherwise to assist him in the conduct of his cause." Best. Ev., *s.* 624; 1 Gr. Ev., *s.* 329. A different rule grew up in equity. The defendant there was obliged to answer under oath the allegations of the bill, and might be compelled to produce for inspection by the plaintiff documents that were in the defendant's possession and control and were material to the issues involved in the suit. In such cases the discovery was incident to the equitable relief sought. But it was not limited to the issues arising in suits in equity. "Many cases existed in which the plaintiff had a legal title, or a legal right, or was pursuing a legal remedy, but wherein no redress could be actually obtained, simply because the plaintiff's evidence either rested in the breast of the defendant, or consisted, in whole or in part, of documents in the defendant's possession. Hence there was failure of justice at common law, and hence there arose the equitable remedy of bills for discovery, which was made use of simply for the purpose of assisting or supplementing the plaintiff's remedy at common law." Bisp. Eq. (6th ed.), *s.* 557; 2 Sto. Eq. Jur., *ss.* 1484, 1485; 1 Pom. Eq. Jur., *ss.* 191, 195. The law expected from the testimony which a party might be compelled to furnish against himself in this way, testimony tending to convict him of a violation of the criminal law, or to subject him to a penalty or forfeiture; also communications between him and his attorney relating to the matters in suit, and, if a public officer, testimony a publication of which would be prejudicial to the community. With these exceptions, a party could be compelled "to discover and set forth upon oath every fact and circumstance within his knowledge, information, or belief," and to produce and

allow his adversary to inspect and copy every document in the party's possession material to the other's case. Ad. Eq., *c.* 1.

The defendants say that this case is not within this equitable jurisdiction, because the discovery and inspection sought is of articles of personal property belonging to them, in which the plaintiff has no right of property or possession. The gist of the action at law, in aid of which this suit was brought, is the negligence of the defendants in furnishing the plaintiff's intestate, their employee, with improper, unsuitable, and dangerous machinery for use in his employment. It is a necessary inference from the allegations of the bill that the "improper, unsuitable, and dangerous" element in the machinery existed in the strap on the connecting rod of the engine. This broke and, it is alleged, caused the intestate's death. The alleged unsuitableness of the strap may be due to inadequacy of size, error in form, imperfection in construction, or inferiority of the materials from which it was made. An inspection of the fragments will evidently aid in determining whether there was one or more of these defects in it, and if so, which. As matters of proof, the fragments would at least be ancillary to other testimony on the point. 3 Gr. Ev., *ss.* 328, 329; Best Ev., *s.* 200. They may be the most reliable and weighty testimony, one way or the other. The bill alleges that the plaintiff cannot properly prepare her action at law for trial without an inspection and examination of them. By reason of the demurrer, this allegation must be taken as true. Unless the equitable remedy of discovery has been superseded by the provision of some plain, adequate, and complete remedy at law, or is not applicable to a case of tort like that alleged in the plaintiff's action at law,—points that are hereinafter considered,—it is certain that the defendants through their officers and agents might be compelled in a suit like the present one to discover the form in which the strap was constructed, the character of the workmanship by which and the materials from which it was made,—in short, all the facts within their knowledge, information, or belief tending to show that it was defective. If they had in their possession a plan of the strap or of the broken pieces, they might be compelled to produce it for examination by the plaintiff. Why, then, may they not be compelled to produce the broken pieces themselves? Two reasons are suggested: one—positive and, if well founded, substantial—that the defendants' right to possess and control the property, growing out of their ownership of it, cannot be infringed in this way; and the other—negative and not applying to the merits of the question—that there is no precedent for a discovery and inspection of such property. It must be admitted that the defendants' right of property in the broken strap will be interfered with to some extent if they are required to produce it and allow the plaintiff and others to examine it. But such interference will not differ in kind or degree from that which occurs when a party is required to produce his letters, deeds, plans, other documents, or books, for inspection. The rights of the defendants arising from the ownership of the

strap are no more sacred than would be their rights arising from the ownership of a plan of the strap, if they had one. The infringement of property rights in such cases is justified upon the ground that it is necessary to the administration of justice. Such necessity is alleged by the plaintiff and admitted by the defendants. It is apparent that an examination of the strap will afford a better means of ascertaining the truth in respect to its suitableness or unsuitableness for the office it was to perform than any possible description or plan of it could afford; and the necessity for an inspection of it is correspondingly greater than the necessity for an oral description or a plan.

The following cases illustrate the application that has been made of the doctrine of discovery in aid of actions at law, in respect to documents and books: ——— v. *Corporation of Exeter,* 2 Ves. 620; *Moodalay* v. *Morton,* 1 Bro. C. C. 469; *Burrell* v. *Nicholson,* 1 Myl. & K. 680; *Storey* v. *Lennox,* 1 Myl. & C. 523; *Smith* v. *Beaufort,* 1 Hare 507; *Chadwick* v. *Bowman,* L. R. 16 Q. B. Div. 561; *Peck* v. *Ashley,* 12 Met. 478. The documents, a discovery of which was sought in these cases, were not muniments of title, or documents containing evidence bearing upon an accounting between the parties, but were letters, books, and papers supposed to contain evidence in support of the plaintiff's case in actions at law. Indeed, no cases have been found in which it is held that the right of discovery in respect to documents depends upon the fact that the documents are muniments of title to property in dispute in the action at law, or that they are relevant to an accounting between the parties sought in such action. The right to the discovery of documents, etc., is as extensive as the right to discovery by oral testimony, and depends upon the same principles.

Marsden v. *Panshall,* 1 Vern. 407, decided in 1686, is an authority that discovery may be had of personal property other than documents, etc. The plaintiff in the suit, a clothier, entrusted clothes to B for sale in London, and B pawned them to the defendant. The defendant confessed that B pawned clothes to him, but did not admit that they were the plaintiff's. The report says: "Sergeant Maynard this day moved for the plaintiff that the defendant might be ordered to let the plaintiff, with two or more persons present, have a sight of the clothes pawned, * * * which was ordered accordingly; the meaning of which was, and so it was taken by the court, that the plaintiff should thereby be enabled to bring an action at law." The defendants say that this was not an order compelling inspection of the defendant's property, as the title was alleged to be in the plaintiff, and this was not denied. But the title to the clothes was the fact to be determined in the action at law. It might turn out that they belonged to the defendant. *Macclesfield* v. *Davis,* 3 Ves. & B. 16, is to the same effect. These cases must be regarded as authorities for the plaintiff in this action.

Occasion for the use of the remedy for the discovery of chattels and for their inspection has undoubtedly arisen more frequently in patent

cases than in others, but the remedy itself has no special features peculiar to such cases. Their peculiarity consists in the manner of affording relief. "It may be by an interlocutory injunction in the first instance. But much more frequently, unless the case is of the strongest possible kind, it is by merely putting the matter in train for determination of the right at law, and then at the hearing a perpetual injunction is granted, upon the plaintiff succeeding in the action at law." *Patent Type Founding Co.* v. *Walter,* Johns. V. C. 727, 730. It should be noted in this connection, also, that the same principles govern discovery, whether it be invoked in aid of other issues involved in the suit in equity, or be invoked independently in aid of an action at law. *Drake* v. *Drake,* 3 Hare 523; *Lyell* v. *Kennedy,* 8 App. Cas. 217; Wig. Dis. 123. If discovery of personal chattels may be had in the former case, it may be had in the latter.

In *Bovill* v. *Moore,* 2 Coop. C. C. 56, Lord *Eldon,* in 1815, said: "There is no use in this court directing an action to be brought if it does not possess the power to have the action properly tried. The plaintiff has a patent for a machine used in making bobbin lace. The defendant is a manufacturer of that article, and, as the plaintiff alleges, he is making it with a machine constructed upon the principle of the machine protected by the plaintiff's patent. Now the manufactory of the defendant is carried on in secret. The machine which the defendant uses to make bobbin lace, and which the plaintiff alleges to be a piracy of his invention, is in the defendant's own possession, and no one can have access to it without his permission. The evidence of the piracy at present is the bobbin lace made by the defendant. The witnesses say that the lace must have been manufactured by the plaintiff's machine, or by a machine similar to it in principle. This is obviously in a great measure conjecture. No court can be content with evidence of this description. There must be an order that the plaintiff's witnesses shall be permitted, before the trial of the action, to inspect the defendant's machine and to see it work." It is true, as the defendants in this case say in their brief, that the order was placed "upon the general doctrine that without such inspection the case could not be properly tried." As has been seen, the remedy for discovery in aid of actions at law was introduced for the very purpose of securing proper trials therein. The application of the remedy to the case was in accordance with the general rule. An action for infringing the patent was brought,—probably by direction of the court after compliance with this order,—and was tried by a jury. *S. C.,* 2 Marsh. 211. *Browne* v. *Moore,* 3 Bli. 178, was a similar case, in which the plaintiff was permitted to inspect the machine which he alleged infringed his patent. *Russell* v. *Cowley,* Web. Pat. Cas. 457, was a bill for discovery as to the defendant's infringement of the plaintiff's patent right for making iron tubing, and for an accounting. The plaintiff's counsel acceded to terms proposed by the other side that an account should be kept and two persons appointed on each side, as inspectors of

the defendant's works, for the purpose of giving evidence at the trial of an action at law to be begun forthwith. An order was made accordingly, and an action was thereupon brought, at the trial of which the inspectors testified, giving expert testimony. The defendants question the authority of this case on the ground that the order of inspection was made with the consent of the parties. Whether the consent was of the nature which the defendants infer it was, is at least doubtful. It may have resulted from a consciousness that the court had power to make the order sought, and may have been given merely to expedite the proceedings. The case is cited as a precedent for the jurisdiction of the court to order an inspection in such cases in *Patent Type Founding Co.* v. *Lloyd,* 5 H. & N. 192. In *Morgan* v. *Seaward,* Web. Pat. Cas. 167, an order for inspection of paddle-wheels and machinery was ordered. *Patent Type Founding Co.* v. *Lloyd* was an action at law, in which the plaintiffs claimed to own a patent for type, the novelty being the use of a large proportion of tin, which made the type hard, tough, and enduring. They moved, under 15 and 16 Vict., *c.* 83, *s.* 42, for leave to inspect the defendant's type, and if necessary to take specimens for analysis, in order that they might produce evidence of the analysis at the trial. The court, being of the opinion that the statute did not give them authority to grant an order for specimens, denied the motion. 5 H. & N. 192. A few days later the plaintiffs filed a bill in equity praying for an injunction and for liberty to inspect the type and take samples. Liberty was granted,—the parties to make the inspection being named in the order,—and the defendant was ordered to furnish not exceeding four ounces of type for analysis. *Patent Type Founding Co.* v. *Walter,* (the defendant in one of the two actions reported in 5 H. & N. 192), Johns. V. C. 727.

There is also a line of cases in which an inspection of real estate has been ordered. *Lonsdale* v. *Curwen,* 3 Bli. 168; *Walker* v. *Fletcher,* 3 Bli. 172; *East India Co.* v. *Kynaston,* 3 Bli. 153; *Attorney-General* v. *Chambers,* 12 Beav. 159; *Lewis* v. *Marsh,* 8 Hare 97. In a note to the first-named case, Bligh, the reporter, says: "The practice in courts of equity of granting orders for inspection of mines, machines, etc., is well settled. But no notice has ever been taken of the point in the books of practice, and no authorities are to be found upon the subject in the reports of cases in equity, except in the case in the court below of *Kynaston* v. *East India Co.*, as reported 3 Swan. 248, and upon appeal to the house of lords, now reported in the text, and which case as it relates to warehouses is distinct from former authorities and new in its kind. Two cases of orders for inspection extracted from the register's book are therefore subjoined,"—being *Walker* v. *Fletcher* and *Browne* v. *Moore, supra,*—the former providing for an inspection of mines, and the latter, as has already been stated, for an inspection of machinery in a case for an infringement of a patent. Story, after speaking of the defect in the administration of justice in courts of common law, arising from their want of power to "compel the production of deeds, books, writings, and other things"

material to the issues on trial, says the defect is "remediable in courts of equity, which will compel the production of such books, deeds, writings, and other things." 2 Sto. Eq. Jur., *ss.* 1484, 1485. See, also, 1 Pom. Eq. Jur., *s.* 191. It would seem that these authors had in mind something besides books and documents.

One reason suggested by the defendants why these cases do not support the plaintiff's claim is because, as they say, in all of them the plaintiffs set up an interest in the property to be inspected. As has been already observed, it is not perceived how this affects the question. The inspection was ordered in each case while the interest was undetermined, and there was no presumption that it would be determined in favor of the plaintiffs. If determined in favor of the defendants, the inspection would in fact be of their property, the same as in the cases cited in which letters and other documents were subjected to inspection. The defendant in *East India Co.* v. *Kynaston* had no interest whatever in the warehouse, for the examination of which he sought an order. The facts of this case, at least, do not support the defendants' contention. It is also to be noticed that none of the cases places the right of discovery upon this circumstance. The right, as in all other cases, depends upon the necessity for discovery in the administration of justice.

To warrant discovery, it is not necessary that there should be absolutely no means of proving the plaintiff's case without it. In *Bovill* v. *Moore,* there were witnesses who would say that the lace made by the defendant was manufactured by the plaintiff's machine or one constructed on the same principle. The plaintiff had some evidence to sustain his case, but it was not satisfactory. A party may maintain a bill for discovery, "either because he has no proof, or because he wants it in aid of other proof." 2 Sto. Eq. Jur., *s.* 1483; Mer. Eq., *ss.* 853, 854. "When the plaintiff has any case to make out, he has a right to discovery of anything that may assist him in proving his case, or even the smallest tittle of it." *Jenkins* v. *Bushby,* 35 L. J. Ch. 400.

The defendants cite three New York cases in support of their contention—*Kennedy* v. *Nichols,* 68 N. Y. Supp. 1053, *Ansen* v. *Tuska,* 1 Rob. Sr. Ct. 663, and *Cooke* v. *Company,* 29 Hun. 641. In the first case provisions of the code and of general rules of practice adopted under the authority of the code, relating to discovery upon a motion in an action at law, are construed, and what is said respecting discovery is based upon *Ansen* v. *Tuska.* That was an action at law in which there was a motion under the code, by the defendant, for the production of the goods involved in the action and an inspection of them by persons to be selected by him to enable them to testify as experts. In denying the motion, the court refer to the equitable remedy of discovery, and say in general terms that there is no authority or principle for discovery such as was asked for in the case. There is no discussion of the principles, and no authorities are cited relating to the matter. In *Cooke* v. *Company,* the question is disposed of without an examination of authorities. The reasons given for

the holding are that a discovery and inspection of the personal property of an adverse party would be a ursurpation of authority to search and inspect his private premises, and that discovery of books and documents is discretionary with the court, and is exercised only where the party applying has some right or interest in the books and documents. While the defendant may be compelled to disclose whether he has the article in his possession and control, and if he has to produce it for inspection, the procedure is not a search in the sense indicated. It affords no just cause for the fear expressed by the court that "the dwellings of our citizens will be of small security to them if they may be invaded by their enemies and searched for articles of personal property to be inspected under an order of a court." Neither does the right of discovery of books and documents depend upon the discretion of the court (Wig. Dis. 51; *Drake* v. *Drake,* 3 Hare 523); nor upon the parties having some right or interest in them other than as items of testimony in his favor. Wig. Dis. 209, 210, 256; Kerr Dis. 202; 2 Sto. Eq. Jur., s. 1490; 1 Pom. Eq. Jur., s. 205; *Attorney-General* v. *Thompson,* 8 Hare 106; *Arnold* v. *Water Co.,* 18 R. I. 189. The slight infringement of the right of property that is involved in an inspection of it under an order of a court of equity is justified by "due process of law" or "the law of the land," and is in no sense a violation of the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.

A consideration of the origin of the equitable remedy for discovery, and of its nature and purpose, leads to the conclusion that it may be employed to compel the production of personal chattels, as well as books, deeds, letters, and other documents, for inspection and examination, in aid of an action at law; and the foregoing cases confirm this conclusion.

The defendants' second objection is because the discovery and inspection are sought for the purpose of having the broken strap examined by persons with a view of enabling them to testify as experts in the action at law. This objection must also be overruled. It is evident that expert testimony may be competent upon the issue to be tried, whether it relate to the form of the strap, the manner of its construction, or the character of the materials from which it was made. The defendants have ample opportunity to procure such testimony. Justice requires that the plaintiff shall also have an opportunity to have the strap examined by persons in whose skill and scientific knowledge she has confidence. There cannot be a fair trial of the case unless such opportunity is given to the plaintiff. Indeed, it may be that she cannot establish her right—if she have one—without having the opportunity. The necessity for it is alleged, and admitted by the demurrer. The object of the plaintiff's bill is the discovery of testimony for use at the trial, but the discovery must necessarily take place prior to the trial. In *Marsden* v. *Panshall, supra,* the suit in equity was begun before the action at law, in order that "the plaintiff should thereby be enabled to bring an action at law." See, also, *Bovill* v. *Moore, supra*; *Heathcote* v. *Fleete,* 2 Vern. 442; *Morse* v. *Buckworth,* 2

Vern. 443; 2 Sto. Eq. Jur., *s.* 1495; 1 Pom. Eq. Jur., *s.* 197. In *Russell* v. *Cowley, Patent Type Founding Co.* v. *Walter, supra,* and apparently in the other patent cases cited, the inspection was ordered to enable witnesses to give expert testimony at the trial of the actions at law. See, also, *Burrell* v. *Nicholson,* 1 Myl. & K. 680; *Arnold* v. *Water Co.,* 18 R. I. 189.

The defendants place much reliance upon their third point, viz., that the equitable remedy for discovery cannot be invoked in aid of an action at law for a personal tort. They do not question, and in view of the authorities cannot question, the proposition that discovery may be had in aid of actions of tort relating to property, such as trover, detinue, trespass, waste, etc. *East India Co.* v. *Evans,* 1 Vern. 307; *Marsden* v. *Panshall,* 1 Vern. 407; *Heathcote* v. *Fleete,* 2 Vern. 442; *Morse* v. *Buckworth,* 2 Vern. 443; *Sloane* v. *Hatfield,* Bunb. 18; *Taylor* v. *Crompton,* Bunb. 95; *Macclesfield* v. *Davis,* 3 Ves. & B. 16; *Burrell* v. *Nicholson,* 3 B. & Ad. 649,—1 Myl. & K. 680. But they say that a defendant cannot be called upon to implicate himself directly or indirectly in a personal tort because it would tend to show moral turpitude, and so is inconsistent with principles of natural justice. It is true, as has already been stated, that a person cannot be called upon to furnish testimony in aid of such an action or any other which tends to show that he has committed a crime or misdemeanor, or that he is liable to a penalty or a forfeiture of property. Testimony of this kind is excepted from the operation of the remedy, in deference to the fundamental law that no subject shall be compelled to accuse or furnish evidence against himself in a criminal proceeding. It is said also that this equitable jurisdiction will not be exercised in controversies involving moral turpitude and arising from acts clearly immoral, even though brought for the purpose of recovering pecuniary compensation. 1 Pom. Eq. Jur., *s.* 197; 2 Sto. Eq. Jur., *s.* 1494; Wig. Dis. 83; and authorities cited in notes. If this be so, this case is not thereby excluded from the jurisdiction; for, so far as appears, it does not involve moral turpitude or immoral conduct on the part of the defendants. They are charged with negligence, merely, consisting of a failure to perform their implied contractual obligation to provide the plaintiff with suitable machinery for the performance of his duties, or a suitable place in which to work. Although the action at law is in form tort, it is in fact based upon the failure to perform a duty arising from an implied promise. It is as distinguishable in this respect from an action of trespass to the person, as an action against a common carrier for the loss of goods in his custody is distinguishable from an action for setting fire to one's house. *Morse* v. *Buckworth,* 2 Vern. 443.

If the case is excepted from the equitable jurisdiction pertaining to discovery, it must be for some other reason than that a discovery would show moral turpitude or immoral conduct on the part of the defendants; and none has been suggested excepting an absence of precedents supporting the jurisdiction. The plaintiff cites and relies upon *Macaulay*

v. *Shackell,* 1 Bli. N. S. 96, as an authority in her favor upon this point. Macaulay brought an action at law against Shackell and others for libel, and the defendants pleaded the truth of the alleged libelous matter, and in aid of their defence filed a bill for discovery and a commission for examining witnesses abroad. Macaulay filed a demurrer to the bill, which was overruled by Lord *Eldon,* Chancellor, and Macaulay appealed to the house of lords, where the judgment of the lord chancellor was affirmed, so far at least as it granted a commission for taking testimony abroad. There seems to be a difference of opinion regarding the scope of the decision, some holding that it required Macaulay to answer the bill and make the discovery sought, and others that it only granted a commission to take testimony abroad. See Redfield's note to 2 Sto. Eq. Jur., *s.* 1494. The decision was rendered in 1827, and Mr. Shadwell (presumably Sir Lancelot) was senior counsel for Macaulay. Four years later the case of *Wilmot* v. *Maccabe,* 4 Sim. 263, was before Sir Lancelot *Shadwell* as vice-chancellor. This was also a bill for discovery in aid of a defence alleging the truth of the libelous matter with which the party was charged in an action at law. The vice-chancellor, referring to *Macaulay* v. *Shackell,* said: "Lord *Eldon,* and the house of lords on appeal, decided that where a person brings an action for a libel it follows, as commensurate with the right to bring the action, that the party who complains is bound to give the discovery which the defendant at law claims to have by his bill." The vice-chancellor must have been familiar with the decision in the Macaulay case; and if the report of the case leaves a doubt regarding the decision, the statement of the vice-chancellor would seem to be sufficient to remove the doubt. In an earlier case of the same kind (*Thorpe* v. *Macauley,* 5 Mad. 218) the discovery sought was denied on the ground that it would show that the party had committed a misdemeanor, but the vice-chancellor, Sir John *Leach,* used the following language in disposing of the question: "It was next argued that a court of equity would not lend its aid, either for discovery or commission, to either party in an action at law proceeding *ex delicto.* * * * No such limitations of the jurisdiction as to discovery is hinted at in any book of practice or by the *dictum* of any judge. Courts of equity exercise a direct jurisdiction in matters of waste and public nuisance, which are *ex delicto.* I am not therefore prepared to say that a court of equity will refuse its ordinary aid to the parties in any action at law proceeding for a civil remedy." This cannot be regarded as authority on the point, but it is worthy of notice in this connection. Chancellor *Walworth* regarded these cases as authorities in favor of the right of discovery in actions for libel unless the discovery would tend to incriminate the party or render him infamous. *Marsh* v. *Davison,* 9 Pai. Ch. 580, 584, 585, 586.

A *dictum* of Lord *Langdale,* Master of the Rolls (who, Lord Campbell, in his Lives of the Lord Chancellors, *vol.* 12, *p.* 351, says "is without vigor and has not a judicial mind"), in *Glynn* v. *Houston,* 1 Ke. 329, decided in 1836, has added to the doubts regarding the decision in

Macaulay v. *Shackell.* The case was a bill for the discovery of books and documents in aid of an action at law for an assault and false imprisonment. The discovery was denied on the ground that it would incriminate the party called on to make it. The *dictum* referred to is as follows: "I have looked into the authorities, which tend very much to confirm my opinion that a bill of discovery cannot be sustained in aid of an action for a mere personal tort. If it were necessary to expressly decide this point, I think it is clear what the course of my duty would be; but it is not here necessary, because a bill of discovery cannot be sustained in any case where the matter sought to be discovered may be made the subject of a criminal charge." The defendants say that this is a decision upon the point, but it is apparent that it is far from being such. If it had been necessary to decide the point, it is highly probable that *Macaulay* v. *Shackell* and *Wilmot* v. *Maccabe* would have been noticed and either distinguished, overruled, or set right. There is no distinction between libel and assault, as personal torts, which would account for a difference in the application of the doctrine of discovery to them. There are similar *dicta* by *Cockburn,* C. J., in *Pye* v. *Butterfield,* 5 B. & S. 829, 836, and by Lord *Fitzgerald,* in *Lyell* v. *Kennedy,* 8 App. Cas. 217, 233.

These *dicta* certainly cannot be regarded as settling the law on the subject. Attention has not been called to any English case in which they have been adopted as the law. The industry of the counsel on both sides in searching for English and American authorities bearing upon the case, manifested by the numerous citations which they have made, justifies a conclusion that no such case exists. Wigram cites *Glynn* v. *Houston* three times, but makes no mention of the point in Lord *Langdale's dictum.* Wig. Dis. 5, 81, 85. Kerr says "it seems" that a bill for discovery will not be entertained in aid of an action for a mere personal tort, citing *Glynn* v. *Houston.* In the next paragraph he says: "It is no objection that the discovery be sought in aid of actions which sound in tort. Bills may also be brought for discovery in aid of or in defence to actions of trespass and trover; and, in general, there seems to be no civil right, the trial of which will not be aided by a bill of discovery." Kerr Dis. 6, 7. Evidently Lord *Langdale's dictum* did not appeal to him as having much weight.

One American case has been cited in which the point was decided in favor of the defendants' contention, *Robinson* v. *Craig,* 16 Ala. 50. The decision was based solely upon *Glynn* v. *Houston* and the absence of authorities the other way. There was no consideration whatever of the principles involved in the question. If the absence of authorities is entitled to any weight, it is under the circumstances very slight. Cases for personal torts arising from the action of the defendant,—willful torts, so to speak,—in which the defendant could make discovery without incriminating himself, must from the nature of the case be very rare. It is possible that there have been none excepting *Macaulay* v. *Shackell,* and cases of like nature that have been decided in accordance therewith

without again raising the question. Cases from negligence were not common prior to the middle of the last century. The use of steam and electricity, and the commercial activity consequent thereon, have immensely multiplied cases of this kind. Lord Campbell's act for giving compensation to the families of persons killed by the negligence of others was enacted in 1846. Eight years later a procedure bill was passed, largely through the agency of Lord Campbell (17 & 18 Vict., *c.* 125), by which, among other things, it was provided that either party to a civil action in the superior courts "shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute." *Ib., s.* 58. In speaking of this act, Lord Campbell says: "It brings about, as far as is now practicable, the fusion of law and equity, and establishes the principle on which our jurisprudence must henceforth be moulded, one court for one cause,—*i. e.*, that the court in which the suit commences shall carry it through all its stages, and finally determine it and everything connected with it. Thus parties will no longer be kept oscillating between law and equity till the subject-matter in controversy is wasted in costs." Lives of the Lord Chancellors, *vol.* 12, *p.* 395. In passing, it may be remarked that if the act and the reason of its enactment do not show that its author understood that courts of equity had jurisdiction to order an inspection of real or personal property when such inspection was material to the proper determination of an issue, it certainly shows that he felt there was a necessity for such inspection in the administration of justice. The act relieved parties from the necessity of resorting to equity for discovery, and reasonably accounts for the absence, in England, of bills of discovery in aid of actions at law for negligence since that time.

"Cases must arise from time to time which are new cases in specie, but which are not new cases with respect to the general principle by which they must be decided." 1 Bli. N. S. 133; *Walker* v. *Walker,* 63 N. H. 321; *Boody* v. *Watson,* 64 N. H. 162; *Gage* v. *Gage,* 66 N. H. 282. If *Macaulay* v. *Shackell* and *Wilmot* v. *Maccabe* are not authorities in favor of the maintenance of the plaintiff's bill, the general principles governing the remedy of discovery certainly justify its maintenance. The case may be a new case in specie, so far as discovery is concerned, but it belongs to a class to which the remedy of discovery is applicable.

It has been suggested that this is a "fishing bill," and should be dismissed for that reason. The plaintiff is not endeavoring to ascertain what defence the defendants contemplate making, nor facts that exclusively relate to the defendants' case, but is seeking discovery of facts that will enable her to prove her case. It is not a fishing bill.

The defendants further say that the statutes of the state removing the disability of parties as witnesses (P. S., *c.* 224, *s.* 13), authorizing the taking of depositions before trial (P. S., *c.* 225), and giving the court

authority to order a view at the trial (P. S., *c.* 227, *s.* 19), furnish a full, complete, and adequate remedy at law for obtaining the testimony which the plaintiff seeks, and so ousts the court of its equitable jurisdiction. If these statutes have such effect in cases where the testimony sought may be obtained under them, which is doubtful (*Wheeler* v. *Wadleigh,* 37 N. H. 55; *Howell* v. *Ashmore,* 1 Stock. 82; *Shotwell* v. *Smith,* 20 N. J. Eq. 79; *Union etc. R'y* v. *Baltimore,* 71 Md. 238; *Russell* v. *Dickeschied,* 24 W. Va. 61, 68; *Lovell* v. *Galloway,* 17 Beav. 1; 1 Sto. Eq. Jur., *s.* 64), it does not appear that the plaintiff could obtain by virtue of them an inspection of the broken strap prior to the trial. The size and character of the strap are not stated, but it is reasonably certain that a *subpœna duces tecum* would be powerless to cause its production at the taking of depositions. A view of it at the trial would not answer the requirements of justice, according to the allegations of the bill.

The demurrer should be overruled.

Exception sustained.

All concurred.

CHAPTER III.

GROUNDS FOR EQUITY JURISDICTION.

SECTION 1. NO LEGAL RIGHT OR REMEDY.

BURGESS *v.* WHEATE.

IN CHANCERY, 1759.

[1 *Eden* 177.] [1]

By indenture bearing date the 11th of *January* 1718, (there being no issue of the marriage), made between *Nicholas Harding* and *Elizabeth* his wife, of the one part, and Sir *Francis Page* and *Robert Simmons* of the other part, reciting the settlement of the 16th of *August* 1695, and covenanting to levy a fine to assure the premises to the use of the daughters of the marriage, as tenants in common; and, in default of such issue, to *Page* and *Simmons,* and their heirs, in trust for the said *Elizabeth Harding,* her heirs and assigns, to the intent that she might at any time during her life, without her husband's concurrence, dispose of the reversion of the moiety aforesaid to such uses, &c., as she should by her will, or other writing, appoint, and for no other use, intent, or purpose whatsoever. A fine was accordingly levied.

There was no daughter of the marriage; Mrs. *Harding* survived her husband without making any appointment, and without heirs on the part of the father, from whence the land descended. But *Burgess,* the plaintiff, was her heir on the part of the mother.

On the death of Mrs. *Harding,* Sir *Francis Page,* the surviving trustee, got into possession; and in *July* 1739, the bill in the first cause was filed against him by *Burgess,* and, on Sir *Francis's* death, it was revived against his personal and real representatives. It prayed that, if there was any legal interest in Sir *Francis Page,* he might be compelled to convey to plaintiff, deliver up possession, and account for the rents and profits. The answer insisted that he was lawfully seised of the inheritance of the estate, and entitled to the rents and profits.

On the 14th of *July* 1741, the cause came on to be heard before Lord *Hardwicke,* C., who, on the pleadings being opened, objected to the

[1] Only a part of the statement of facts is given.

Attorney-General's not being a party. Both parties were desirous that there should be no question about the escheat, and the *Attorney-General* did not insist upon it. But the *Lord Chancellor* asking him if he waived any right the crown might have, and would consent that it might be so entered, the cause stood over, and the *Attorney-General* was made a party. It coming on again before Lord *Hardwicke* on the 11th of *February* 1744, a case was directed to be made for the opinion of the court of *King's Bench,* with the three following questions.

First, Whether, by virtue of the indenture of the 11th of *January* 1718, and the fine therein mentioned, any and what estate in law did pass to *Page* and *Simmons,* or either of them?

Second, In case no estate passed to *Page* and *Simmons,* or either of them, by virtue of that indenture and fine, whether the inheritance of the premises, or any part thereof, did, on the death of *Elizabeth Harding,* descend to *Burgess* as heir at law on the part of the mother?

Third, In case the said deed of the 11th of *January* 1718 had not been executed, or the fine levied, but the same were entirely out of the case, whether the inheritance of the said premises, or any part thereof, would have descended to the said *Richard Burgess* as heir at law on the part of the mother? And the consideration of costs and further directions was reserved till the opinion of the judges should be certified.

Lord MANSFIELD, C. J.[1]

On the ground of the case on the certificate, the whole turns on the effect and operation of the deed of 1718 in a court of equity.

The first question that arose was between the heir and the trustee only. Sir *F. Page* entered 1738, and *July,* 1739, *Burgess,* as heir of *Elizabeth Harding,* brought his original bill against the trustee. On the 14th of *July,* 1741, the cause came on to be heard. On the pleadings being opened, and the nature of the question appearing, *Lord Chancellor* himself objected to the *Attorney-General's* not being a party in respect of the king's right by escheat. Both parties were extremely desirous that there should be no question upon the escheat, and the *Attorney-General* did not insist upon it; but the *Chancellor* asking him if he waived any right the crown might have, and would consent it might be so entered, the cause stood over. The *Attorney-General* was then made a party, and the information was filed on behalf of the crown.

There are three competitors before the court. Two claiming as plaintiffs, and praying relief; the third a defendant, objecting to any relief. The heir on the part of the mother claims by an alteration having been made in the deed of 1718, in this court as well as at law. And, had the

[1] Of the great Lord Mansfield, as he was called in his lifetime, Lord Eldon said: "A very eminent judge * * * who would be remembered as long as the law of England or Scotland exists" (Feoffees of Heriot's Hospital (1814) 2 Dow, 306, 311); "That doctrine was founded on the opinion of one of the greatest judges that ever sat in Westminster Hall, Lord Mansfield" (*Westmeath* v. *Westmeath* (1830) 2 *Dow & Cl.* 543).

trustee conveyed to Mrs. *Harding* after the husband's death (the only purposes for which the trust was created being then ended), the heir, on the part of the mother, had undoubtedly been entitled.

The king claims, as the deed of 1718 is a conveyance only of legal form, and has in this court made no alteration in the beneficial estate; but has left it to go in this court as it would have gone before at law, as if the deed of 1718 had never been made.

The trustee objects to the heir's claim, because he says the deed of 1718 has made no alteration as to the beneficial estate of which Mrs. *Harding* died seised *ex parte paternâ,* and opposes the king's right because it has changed the right of escheat, both at law and in equity; and upon a general objection that the plaintiffs must recover upon their own strength to entitle them to relief: for it is not enough for the plaintiffs to shew that the defendant has no right, but that they have a better, upon equitable grounds; and, in the case of a trust, must shew a better right within the terms of the creation of the trusts.

It seems agreed in this case, that the heir *ex parte maternâ* cannot inherit the trust because the trust ensues the nature of the land; which, before the deed of 1718, could not have descended in the maternal line; and I am at present of that opinion. The doubtful question is, whether the king is entitled to this trust? And that will depend upon arguments drawn from the nature and effect of a conveyance in trust, and from the nature of the right of escheat.

I will follow the method which was used at the bar under the four following heads. *First,* the nature of trusts of land, and the rules which govern them. *Secondly,* the nature of that right, by which the king claims in the present case. *Thirdly,* whether, if the trustee had died *sans* heir, the king must not, in that case, have taken the land in a court of equity, subject to the trust. *Fourthly,* I shall apply the result of this inquiry as between the king and the trustee, to the particular point immediately in judgment.

First, As to the nature of trusts of land, and the rules by which they are governed. By an inquiry into the nature of a use or trust of land, no more is or can be meant, than, as to uses, to find out historically, on what principles courts of equity, before 27 *H.* 8., received jurisdiction, in modifying or giving relief in rights or interests in lands, which could not be come at but by suing a *subpœna;* as to trusts, what the court does in modifying, directing, and giving relief in the said rights and interests in cases where there is no remedy, but by bill in a court of equity.[1]

Trusts in *England,* under the name of uses, began, as they did in *Rome,* under no other security than the trustee's faith.[2] They were founded in

[1] Only so much of Lord Mansfield's opinion is given as relates to the history and general nature of a trust estate.

[2] "Nota. An use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collaterall, annexed in privitie to the estate of the land, and to the person touching the land, *scilicet,* that *cesty*

fraud to avoid the statute of mortmain. Lord *Bacon* thinks them little known before *Richard* the Second's time.[1]

Though the first hint of uses was probably to avoid the mortmain act, yet they were innocently applied soon after to other purposes. A benefit to issue out of lands could only be made by the interposition of uses: wills of land could only be made that way.

Natural justice said, he who breaks his trust does wrong; so *cestuy que use* was driven into *Chancery* by breach of faith. There were not six cases of uses before *Edward* the 4th's time. The court first inter-

que use shall take the profit, and that the terre-tenant shall make an estate according to his directions. So as *cesty que use* had neither *jus in re*, nor *jus ad rem*, but only a confidence and trust, for which he had no remedy by the common law, but for breach of trust his remedie was only by subpœna in chancerie."—*Co. Lit.* 272 *b.*

"A trust is where there is such a confidence between the parties, that no action at law will lie, but is merely a case for the consideration of this court." *Per Lord Hardwicke in Sturt* v. *Mellish* (1743) 2 *Atk.* 610, 612.

"*A trust* is merely what a *use* was before the statute of uses. It is an interest resting in conscience and equity, and the same rules apply to trusts in chancery now which were formerly applied to uses." *Per Kent in Fisher* v. *Fields* (1812) 10 *Johns.* 495, 506.

"It is necessary to take notice of the different interests in land at this day. There are three kinds: First, the estate in the land itself; the ancient common law fee. Secondly, the use; which was originally a creature of equity, but since the statute of uses, it draws the estate in the land to it; so that they are joined and make one legal estate. Thirdly, the trust; which the common law takes no notice of, but which carries the beneficial interests and profits in this court; and it is still a creature of equity, as the use was before the statute."—*Per Lord Hardwicke in Willet* v. *Sandford* (1748) 1 *Ves.* 186.

"Under this practice a very refined system grew up. The legal estate was in one person and the use and enjoyment in another. There were two titles and estates in the same land,—that of the feoffee, who was the legal owner, and yet had nothing, and that of the *cestui que use*, who had the whole beneficial right and interest, and yet had no legal right or title. He had nevertheless a substantial interest and estate which he could convey, devise, and otherwise deal with, as with tangible property. Great inconvenience arose from this double system." *Perry on Trusts, Vol.* 1, § 4.

[1] "There were two inventors of uses, fear and fraud: fear in times of troubles and civil wars, to save their inheritances from being forfeited; and fraud, to defeat due debts, lawful actions, wards, escheats, mortmains, etc."—*Coke in Chudleigh's Case* (1589-1595) 1 *Rep.* 120 *a. b.* To this statement Mr. Thomas wrote the following editorial note: "Some have thought that uses were introduced during the contests between the houses of York and Lancaster, to avoid forfeitures, see Lloyd *v.* Spillet, 2 Atk. 150; but the more general opinion is, that they were known at a much earlier period, see Brent's Case, 2 Leon. 14. Bro. N. C. 60. March. N. C. 128. 22 Vin. Abr. 179. pl. 2. n.—. 1. Sand 6, 14."

As to the time of their introduction, *Harper, J., in Brent's Case* (1583),

posed on very narrow grounds: so far as a personal confidence was placed in the trustee, they decreed him to perform the trust; but the heir of trustee or grantee was not liable. *Keilw.* 49. *Subpœna* lay only against trustee himself till *Hen.* 6., and then *Fortescue* changed it. 22 *Ed.* 4. fol. 6. pl. 18. This was against the heir, but upon a reason which equally holds with respect to the grantee. The *Chancellor* afterwards extended his remedy, unless the alienee purchased for valuable consideration without notice.

Great inconveniences arose from so narrow and contracted a system: that the *cestuy que use* should enjoy and dispose, and yet not be owner to all purposes; and that the feoffee, who really had nothing, should be deemed owner so as to convey estates out of his seisin by legal conveyance not subject to the trust. *Bacon's* Use of the Law sums it up very emphatically in these words: "By this course of putting lands into use there were many inconveniences; as this use, which grew first from a reasonable cause, namely, to give men power and liberty to dispose of their own, was turned to deceive many of their just and reasonable rights: as, namely, a man that had cause to sue for his land, knew not against whom to bring his action, nor who was owner of it. The wife was defrauded of her thirds, the husband of being tenant by curtesy, the lord of his lordship, relief, heriot, and escheat; the creditor of his extent for debt; the poor tenant of his lease: for these rights and duties were given by law from him that was owner of the land, and none other, which was now the feoffee of the trust."

* * * Trusts long fluctuated in great uncertainty, 4 *Inst.* 85. In 43 *Eliz.* a trust was decreed in *Chancery* to be a mere right of action, and therefore not assignable. In *James* the First's time (*Abington's* case) all the judges held, the trust of a freehold estate was not forfeitable

supra, said: "Uses began about 18 E. 2 [1325] after which time there was such a general liking of them, that they were anew used, but they did not come into common practice before the time of King Henry the Sixth" [1422-1461]. In the same case, *Dyer, C. J.*, said: "As to the beginning of uses he conceived that the same was immediately after the Statute of Mortmain, at which time all their shifts then in practice were found out: which see, the *Statute of Mortmain*, 7 *E.* 1, [1279], *Stat. de Religiosis;* for which cause they were afterwards driven to find out other shifts not provided for by the statute, which were espyed by the making of the Statute of 15 R. 2. cap. 5 [1392], and in that statute these words, Behoof and Use are used; which is the first place these words have been used in our law."

As to the origin of uses, it has been customary to consider them derived more or less directly from the Roman Law: *Spence, Jurisdiction of the Court of Chancery, Part II, Book 3, c. 2; Story, Equity Jurisprudence* (13th *ed.*) *V. II, p. 268; Pomeroy, Equity Jurisprudence* § 151; *Perry on Trusts* § 3; but a later view regards their source as the early German law. See, *Early English Equity, by Mr. Justice Holmes, in* 1 *Law Q. Rev.* 162; *The Origin of Uses, by Mr. F. W. Maitland,* 8 *Har. Law Rev.* 127; *and* 2 *Pollock and Maitland's History of the English Law,* 226, 227.

for treason; they must therefore consider it as a mere *chose in action.* 2 *Roll.* Abr. *C.* pl. 1. f. 780. Trustee of a term for years is attainted of treason; the term is forfeit to the king free of the trust, because the king comes in the *post,* and cannot be seised of an use.

In my opinion, trusts were not on a true foundation till Lord *Nottingham* held the great seal. By steadily pursuing, from plain principles, trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has been since raised. Trusts are made to answer the exigencies of families, and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of *H.* 8. meant to avoid.

The *forum* where they are adjudged is the only difference between trusts and legal estates. Trusts are here considered as between *cestuy que trust* and trustee (and all claiming by, through, or under them, or in consequence of their estates), as the ownership or legal estate, except when it can be pleaded in bar of the exercise of this right of jurisdiction. Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate. The statute of frauds speaks of devices only of lands and tenements; yet the trust being considered in this court as the land and tenement, can only be devised, as lands and tenements may, pursuant to that statute. How different is it from an use! That is neither land nor tenement. This act gives sanction to trusts divided from the estate, and guards them from the danger of patrol proof.

Twenty years ago I imbibed this principle, that the trust is the estate at law in this court, and governed by the same rules in general, as all real property is, by imitation. Every thing I have heard, read, or thought of since, has confirmed that principle in my mind.

In *Banks* v. *Sutton,* Sir *Joseph Jekyll* boggled at imitating the legal right (which depends upon an actual seisin during the coverture), and of applying it to an equity of redemption. In the eye of this court Lord *Hardwicke* thought the equity of redemption is the fee simple of the land. It will descend, may be granted, devised, entailed, and that equitable entail be barred by a common recovery. This proves it is considered as such an estate, whereof, in consideration of this court, there may be a seisin; for, without such a seisin, a devise could not be good of a trust. He who has the equity of redemption is considered as the owner of the land. He says it is a settled right in equity which a man cannot come at but by *subpœna;* that the husband and wife, being in perception of the rents and profits during the coverture, were seised of a freehold by imitation of the law. The allowing tenacy *per* curtesy of a trust is founded on the maxim, that equity follows the law, which is a safe as well as fixed principle; for it makes the substantial rules of property certain and uniform, be the mode of following it what it will.

So that, I take it, by the great authority of this determination, on clear law and reason, *cestuy que trust* is actually and absolutely seised of the freehold in consideration of this court; and, therefore, that the legal

consequences of an actual seisin of a freehold, shall, in this court, follow for the benefit of one in the *post.*

To conclude this head. An use or trust heretofore was (while it was an use), understood to be merely as an agreement, by which the trustee, and all claiming from him in privity, were personally liable to the *cestuy que trust,* and all claiming under him in like privity. Nobody in the *post* was entitled under or bound by the agreement. But now the trust in this court is the same as the land, and the trustee is considered merely as an instrument of conveyance, therefore is in no event to take a benefit; and the trust must be co-extensive with the legal estate of the land, and where it is not declared, it results by necessary implication; because the trustee is excluded, except where the trust is barred in the case of a purchaser for valuable consideration without notice.

The trustee can transmit no benefit; his duty is to hold for the benefit of all who would have been entitled, if the limitation had not been by way of trust. There is no distinction now between those in *per* and *post,* except in that case of dower which is founded, not upon reason, but practice.

As the trust is the land in this court, so the declaration of the trust is the disposition of the land. Therefore an essential omission in the legal disposition shall not destroy the trust. As where trustee dies before testator, or is incapable, upon the old notion of an agreement, a *subpœna* could not lie against the heir, where the legal limitation was void.[1]

MEGOD'S CASE.

IN THE KING'S BENCH, 1587-88.

[*Godbolt* 64.]

The Case was, That a Feoffment was made unto another man, *ad eam intentionem,* that he should convey the same to such a one, to whom he sold it; and he sold the same to another, and did refuse to convey it, and therefore the other brought an Action upon the Case. And *Gaudy* Justice held, that the Action would lie. But *Suit* Justice held the con-

[1] Lord Mansfield concluded that "the heir *ex parte materna* was not entitled; that from the analogy between trusts and legal estates, the crown was entitled by escheat; but that, if the conveyance had barred the crown of its right, as between the maternal heir and the trustee, the former was entitled."

But the Lord Keeper, and with him the majority of the court, held, "that the maternal heir was not entitled; that, there being a terre-tenant, the crown, claiming by escheat, had not a title by subpoena to compel a conveyance from the trustee, the trust being absolutely determined; no opinion being given upon the right of the trustee."

trary. *Wray* Chiefe Justice did agree with *Gaudy:* for he said, it was a Trust, that he should assure it to another. And it is a good consideration in the Chancery: the conveyance of a Trust, and thereupon, an Action upon the Case will lie.[1]

ALLEN *v.* IMLETT.

NISI PRIUS, 1817.

[1 *F. L. Holt* 641.]

This was an action of money had and received. The bankrupt, *Prior,* before his marriage, by a regular deed of settlement between himself on the one part, his intended wife on the second part, and the defendants, as trustees, on the third part, had settled some stock in the four *per cents.* (and had warranted to settle 400*l.*, being the amount of a bill of exchange, not at that time due,) in trust for *Ann Bridgen,* whom he was about to marry, until marriage; after marriage, to the use of *Prior* himself, during his life; and upon his death to his wife, &c. The stock, being vested in the name of the trustees, was received by *Prior,* before his bankruptcy, under a power of attorney from them. Since his bankruptcy, the trustees had executed a power of attorney to another person to receive it; and had paid it into a banker's, for the use of Mr. and Mrs. *Prior.* The action was brought to recover the sum of 80*l.* 8*s.* 4*d.*, being the amount of three half yearly dividends.

Copley, serjeant, for the plaintiffs, contended, that if the defendants had not received the money, this action could not have been maintained; but, having received it, and paid it over wrongfully, they had no protection from their character as trustees. These dividends were the property of the bankrupt before his bankruptcy, and now became the property of the assignees. The trustees, therefore, were answerable at law for disposing of moneys which the bankruptcy had vested in the plaintiffs.

Blossett, serjeant.—Defendants are trustees; and no action lies against

The case has been severely criticised (see the Reporter's note at the end of the case) but it appears to be the law. 1 *Lewin on Trusts,* 12; *Perry on Trusts,* §8.

For a collection of authorities on the point of law involved, see Professor Ames' note to the principal case in his Cases on Trusts, p. 360.

[1] "If feoffees to an use at common law refuse to make a feoffment, join in voucher, &c., an action upon the case does not lie, for they shall be compelled in chancery. 1 *Rol.* 108 *l.* 35, 45." 1 *Comyn's Dig.* 172, *B.* 8.

"With regard to the other point made, that a breach of trust may not be the ground of an assumpsit, there is not an abridgment in the law which does not contradict such a proposition." *Per Buller, J., in Smith* v. *Jameson* (1794) 5 *T. R.* 601, 603.

them for an abuse of their trust at common law. If there be any redress, it must be through the medium of a court of equity. *Prior* himself, the *cestui que trust,* could not sue his trustees: neither could his assignees, who derive through him.

DALLAS, J.—I am decidedly of opinion that this action cannot be maintained. It is purely a case for a court of equity. I will nonsuit the plaintiff, and give him leave to move to set it aside.[1]

GRIGBY *v.* COX.

IN CHANCERY, BEFORE LORD HARDWICKE, 1750.

[1 *Vesey, Senior* 517.]

On the marriage of defendant and his wife, an estate was settled in trustees to receive the rents and profits for her sole and separate use, and as she should direct and appoint, whether sole or covert. The wife by deeds of appointment sells part to the plaintiff; and the husband covenants, that the said purchase should be free from incumbrances; but the trustees were not consulted therein.

The bill was to have the effect of this bargain; and praying, that plaintiff may be decreed to receive the rents and profits of this part of the estate free from the deduction of the mother's dower.

The wife insisted, that plaintiff had colluded with her husband to

[1] It is said that Lord Hobart held "that *cestui que trust* in an action on the case against his trustee shall recover for a breach of trust in damages." *Per Lord Chancellor Jeffries in Jevon* v. *Bush* (1685) 1 *Vern.* 342; *see also Earl of Kildare* v. *Sir Morrice Eustace* (1686) *ib.* 419.

"When the action of trespass on the case came into use as a means of enforcing equitable demands, an attempt was made to induce the courts of law to entertain an action on the case for damages against trustees of real and personal estate who neglected or refused to perform their trusts. Lord Chief Justice Hobart appears to have considered that such an action might be maintained, but as the jurisdiction of the Court of Chancery for enforcing the actual performance of trusts, which was the true and effectual relief required in such cases, and which a Court of Law could not give, was established, it was considered fit that the Courts of Law should not interfere in such cases, but leave them to the Courts of Equity. Lord Chief Justice North in an argument in the Exchequer Chamber, expressly laid down that no action on the case would lie for a breach of trust of the description we have been considering; the reason which he gave was that the principal thing, viz. the trust, did not belong to the Common Law but to the Court of Chancery."—*Spence, Jurisdiction of the Court of Chancery* 576.

As to the manner in which equity deals with such a breach of trust, see *Shepherd* v. *Mould* (1845) 4 *Hare* 500.

take away that separate power from her: that plaintiff paid the money to her husband, though he saw this settlement to her separate use; therefore did not come into equity unexceptionably and on fair grounds; and that her friends and trustees ought to have been consulted.

LORD CHANCELLOR.

Whatever suspicion or inclination the court has against such a transaction, yet as defendant has brought this case without any proof; it is impossible not to decree to plaintiff the purchase of this equity and trust, the benefit of this purchase as against the wife so far as purchased from her, and as against the husband so far as he has bound himself by his own contract. For the rule of the court is, that where any thing is settled to the wife's separate use, she is considered as a feme sole; may appoint in what manner she pleases: and unless the joining of her trustees with her is made necessary, there is no occasion for that. And this will hold, though the act done by the wife is in some degree a transaction alone with the husband; although in that case a court of equity will have more jealousy over it: and therefore if there is any proof that the husband had any improper influence over the wife in it by ill, or even extraordinary good usage, to induce her to it, the court might set it aside; but not without that. The wife might have made an immediate appointment for benefit of her husband: which would have stood, unless some such proof as before mentioned. Then it certainly cannot be an objection against a purchaser; and if the case is free from other objections, as from the defect of proof it is, the taking the husband's covenant can be no objection. A prudent man acting very fairly and honestly, and consulting the trustees, might have reasonably insisted on a covenant from the husband, that the estate was free from incumbrances: for suppose, the wife had made a prior secret appointment, how could a purchaser be secured without a covenant of the husband? for the covenant of the wife could not have bound her, as the prior appointment would take place. A court of equity cannot say, this is wrong, unless some proof appears of ill usage or distress by the husband. I should then have great difficulty in carrying this agreement into execution, or establishing this purchase; but as it is without proof, it is impossible to say this is not a purchase.[1]

In BUTLER *v.* BUCKINGHAM (1813), 5 *Day* 492, 497.—INGERSOLL, J. said: It is very clear to my mind, that the contract of the respondent, to convey her right of dower, as set forth in the petition, is absolutely

[1] The balance of the opinion, relating to dower rights, is omitted.

Lord Thurlow in Hulme *v.* Tenant (1778) 1 Bro. C. C. 16, 17, said: "Grigby *v.* Cox, 1 Ves. 517, appears to be a decree for specific performance. The defect of that case is that it does not state the trust. It is said that a feme covert is to be considered as a feme sole, with respect to every authority she can exercise over her separate estate; but it is different where the consent

void, and that no relief against a woman, in a case circumstanced as this is, has ever been given. True, it is laid down by elementary writers, and authorities are quoted to justify the position, that as to the separate estate of a *feme covert,* she is, by the court of chancery in Great Britain, considered as a *feme sole;* and that this court will carry into execution her contracts with respect to such estate. To this position, I subscribe; but when I do it, I must explain the principle on which the court of chancery proceeds in such cases, and show the kind of estate it operates upon, as well as the mode in which relief is given.

This estate is not all the real estate belonging to the *feme covert,* nor is it her right of dower in the real estate of her husband; but is such estate only, be it real or personal, as is settled on her, for her separate use, without any control over it, on the part of her husband. As to this kind of estate, the court of chancery, to certain purposes, considers her as a *feme sole;* and her contracts relative to it, if made in a particular manner, are binding.

METHODIST EPISCOPAL CHURCH *v.* JAQUES (1817), 3 *Johns. Ch.* 77, 90. CHANCELLOR KENT.—It may not be amiss to examine the adjudged cases, in respect to this power of disposition in the wife over her separate property settled to her separate use. There is instruction to be gathered on the march, though the path be dreary.[1] . . .

I apprehend, we may conclude, (though I certainly do it with unfeigned diffidence, considering how great talents and learning, by a succession of distinguished men, have been exhausted on the subject,) that the *English* decisions are so floating and contradictory, as to leave us the liberty of adopting the true principle of these settlements. Instead of holding that the wife is a *feme sole,* to all intents and purposes, as to her separate property, she ought only to be deemed a *feme sole, sub modo,* or to the extent of the power clearly given by the settlement. Instead of maintaining that she has an absolute power of disposition, unless specially restrained by the instrument, the converse of the proposition would be more correct, that she has no power but what is specially given, and to be exercised only in the mode prescribed, if any such there be. Her incapacity is general; and the exception is to be taken strictly, and to be shown in every case, because it is against the general policy and immemorial doctrine of law. These very settlements are intended to protect her weakness against her husband's power, and her

of the trustees is made essential to the conveyance, although the mere appointment of trustees is not sufficient to deprive her of that authority: for there must be trustees, otherwise she could have no separate property."

[1] The Chancellor here went into an exhaustive and learned discussion and review of the English cases on the subject.

maintenance against his dissipation. It is a protection which this court allows her to assume, or her friends to give, and it ought not to be rendered illusory.

The doctrine runs through all the cases, that the intention of the settlement is to govern, and that it must be collected from the terms of the instrument. When it says she may appoint by will, it does not mean that she may likewise appoint by deed; when it permits her to appoint by deed, it cannot mean, that giving a bond, or note, or a parol promise, without reference to the property, or making a parol gift, is such an appointment. So, when it says that she is to receive from her trustee the income of her property, as it, from time to time, may grow due, it does not mean that she may, by anticipation, dispose at once of all that income. Such a latitude of construction is not only unauthorized by the terms, but it defeats the policy of the settlement, by withdrawing from the wife the protection it intended to give her. Perhaps, we may say, that if the instrument be silent as to the mode of exercising the power of appointment or disposition, it intended to leave it at large, to the discretion and necessities of the wife, and this is the most that can be inferred.

There being, in the present case, a clear mode of appointment prescribed, it would be unjust, and contrary to the settlement, to allow the defendant, who was a party to the instrument, to set up any parol confession or agreement of the wife, as a title to her property; the exception is consequently overruled.

Exception overruled.[1]

[1] See to the same effect, the elaborate opinion of Chancellor Desaussure in *Ewing* v. *Smith* (1811) 3 *Des.* 417. See also *Albany Fire Insurance Co.* v. *Bay* (1850) 4 *N. Y.* 1.

The principal case was overruled in *Jaques* v. *Methodist Episcopal Church* (1820) 17 *Johns.* 548, the Court of Errors holding that the wife might freely dispose of her separate estate unless limited to a particular mode of disposition by the words of the instrument.

In a letter written to William Johnson in April 1820, Chancellor Kent says: "But, to tell you the truth, I am discouraged and heartbroken. The judges have prevailed on the Court of Errors to reverse all my best decisions. They have reversed Frost *v.* Beekman [18 Johns. 544], the Methodist Episcopal Church *v.* Jaques [supra], Anderson *v.* Roberts [18 Johns. 515] and others. After such devastation, what courage ought I to have to study and write elaborate opinions? There are but two sides to every case, and I am so unfortunate as always to take the wrong side. I never felt more disgusted with the judges in all my life, and I expressed myself to Judge Platt in a way to mortify and offend him. According to my present feelings and sentiments, I will never consent to publish another opinion, and I have taken and removed out of sight and out of my office into another room my three volumes of Chancery Reports. They were too fearful when standing before my eyes."—*Kent's Memoirs and Letters of Chancellor Kent.*

GARSON *v.* GREEN.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1814.

[1 *Johnson's Chancery* 308.]

The bill stated that the plaintiff sold to *James Green,* now deceased, intestate, in his lifetime, the one undivided third part of a house and lot of ground, of which the intestate was seised of two undivided third parts in fee; and for which he was to pay the plaintiff 700 dollars, 200 dollars in cash, and the residue in 55 days, for which he was to give his promissory note; that on the 2d of *December,* 1807, the plaintiff executed and delivered a deed to the intestate, for the plaintiff's undivided third of the premises, and the intestate paid him the 200 dollars, and gave him a promissory note, dated the 12th of *December,* 1807, for 500 dollars, payable in 55 days after date. Before the note became due the intestate died, leaving *Margaret Green,* defendant, his widow, who took out letters of administration on his estate, and the other defendants, his heirs at law.

The administratrix having refused to pay the note, the plaintiff brought an action at law against her, to which she pleaded *plene administravit;* and the plaintiff being unable to prove *assets* in her hands, took judgment for assets *in futuro,* to the amount of 535 dollars and 19 cents, and the costs of suit. The plaintiff alleged that the intestate died seised of the house and lot above mentioned, and other real estate in *New-York,* and left considerable personal estate, which came into the hands of the administratrix.

The bill, as to the administratrix, was, under the order of the court, taken *pro confesso.* The other defendants, by their guardian, answered, and admitted the sale by the plaintiff to their father, the intestate, and that he owed to the plaintiff the amount of the note, but whether it was for part of the consideration money for the house and lot they were ignorant.

The material allegations in the bill were proved by the witnesses.

THE CHANCELLOR. It is very evident from the proof, that the note was given in part payment of the consideration for the sale, by the plaintiff, of his undivided third part of the house and lot mentioned in the pleadings; and there is no evidence that the vendor did not mean to trust to the estate sold, as a pledge for his money. It is a well-settled rule, (6 *Ves.* 483, 759, 760. 1 *Schoale & Lefroy,* 132. 1 *Bro.* 420. *Sugden,* ch. 12. p. 352,) that the vendor has a lien on the estate for the purchase money, while the estate is in the hands of the vendee, and when there is no contract that the lien, by implication, was not intended to be reserved. *Prima facie* the purchase money is a lien on the land, and it lies on the purchaser to show that the vendor agreed to rest on other security. The death of the vendee does not alter the claim; for, as

Lord *Redesdale* observed, in a like case, (*Hughes* v. *Kearney,* 1 *Schoale & Lefroy,* 132,) "the heir cannot be permitted to hold what his ancestor unconscientiously obtained; and is not a thing unconscientiously obtained when the consideration is not paid?" Taking a note for the purchase money does not affect the vendor's lien, and if part be paid, the lien is good as to the residue, and the vendee becomes a trustee as to that which is unpaid. (*Blackburn* v. *Gregson,* 1 Bro. 420.) The failure of the personal estate is sufficiently shown in the first instance; and there is nothing to gainsay it, and I shall, accordingly, decree a sale of the one third of the house and lot, towards satisfaction of the note.

Decree accordingly.[1]

MACKRETH *v.* SYMMONS (1808) 15 *Ves., Jr.* 329, 336.[2]—*The Lord* CHANCELLOR [ELDON]. Upon the special circumstances of this case, I shall postpone my judgment: but I shall be very unwilling to leave some of the doctrine, that has been brought into controversy, with so much doubt upon it, as would be the consequence of deferring the judgment without taking some notice of it. The settled doctrine, notwithstanding the case of *Fawell* v. *Heelis* (*Amb.* 724. 1 *Bro. C. C.* 3d edit. 422, note. 2 *Dick.* 425.) is, that unless there are circumstances, such as we have been reasoning upon, where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt, endorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and the vendee, and persons, claiming as volunteers, upon the doctrine of this Court, which, when it is settled, has the effect of contract, though perhaps no actual contract has taken place, a lien shall prevail; in the one case for the whole consideration; in the other for that part of the money which was not paid. I take that to have been the settled doctrine at the time of the decision of *Blackburn* v. *Greyson* (1 *Bro. C. C.* 420.); which case so far shook the authority of *Fawell* v. *Heelis* as to relieve me from any apprehension, that Lord *Bathurst's* doctrine can be considered as affording the rule, to be applied as between the vendor and vendee themselves, and persons claiming under them.

There is a case, *Smith* v. *Hibbard,* (2 *Dick.* 730.) reported nowhere but in *Dickens,* which seems to decide this point. There is also another case, besides those which have been mentioned, showing the opinion of Lord *Hardwicke,* that the lien prevails: *Harrison* v. *Southcote:* (2 *Ves.* 389. See 393.) the case of a Papist vendor, for whom, Lord *Hardwicke* says, the lien would not be raised; as that would be giving an interest in land to a Papist: the specialty of that proving, that the lien prevails in general cases. In the case of *Elliot* v. *Edwards,* (3 *Bos. & Pul.* 181. See 183.) Lord *Alvanley* was very strong upon it. There was

[1] See, for a collection of authorities, Mr. Waterman's to Warner *v.* Van Alstyne (1832) 2 Paige Ch. 514.

[2] *S. C.* 1 *White and Tudor's Leading Cases in Equity* *289, with notes.

a covenant for payment of the money upon the first purchase; and also an undertaking by a surety: strong circumstances to show, that, as between the vendor and vendee, there is no intention to rely upon the lien. The point was not decided in that case: but Lord *Alvanley* lays down the doctrine as I have stated it; that even in the hands of another person, with notice, the lien remains. In *Gibbons* v. *Baddall* (2 *Eq. Ca. Ab.* 632.) the lien was held to be clear against a second purchaser, with notice. There is a very old case in *Cary*, (*Hearn* v. *Botelers, Cary*, 25.) which I have cited as one of this class: but I have some doubt, whether it is not a case of equitable interposition upon another ground. The circumstances, leading me to that doubt is, that there was a lost bond; and as the modern doctrine of dispensing with *profert* was not at that time known. The Lord *Chancellor* might, therefore, consider himself as having jurisdiction in that case to direct payment of the money, due upon that bond, out of the estate.

In *Austen* v. *Halsey* (6 *Ves.* 475. See 483.) what I stated upon this subject was not said without much consideration. I had not at that time, nor have I now, the least doubt, that it is the doctrine. I have some doubt upon another point: taking the vendor to have the lien, whether the Court will, in case of the death of the vendee, marshal the assets; so as to throw the lien upon the purchased estate. It has often been said, and the case of *Coppin* v. *Coppin* (2 *P. Will.* 291. Sel ca ch. 28.) stated as an authority, that the Court will not do that. The Lord *Chancellor* in his judgment takes no notice of that point. In that case the vendor happened to be the heir of the vendee; so that the estate was at home; and it was held, that being also the executor, he was entitled to retain the purchase-money out of the personal assets. That decision requires a good deal of consideration. If the estate had been in a third person, the general doctrine as to a person having two funds to resort to might be thought to have an immediate application; and the express terms of the decree in *Pollexfen* v. *Moore* (3 Atk. 272.) might be found very inconsistent with it.

It is not, however, necessary to decide that point; as this is an equity that in ordinary cases will affect a purchaser. Upon principle, without authority, I cannot doubt that. It goes upon this; that a person, having got the estate of another, shall not, as between them, keep it, and not pay the consideration; and there is no doubt, that a third person, having full knowledge that the other got the estate without payment, cannot maintain, that though a Court of Equity will not permit him to keep it, he may give it to another person, without payment. It is not, however, necessary to discuss that upon general principles; as it has been repeatedly stated by authorities, that ought at this time to bind upon that point.[1]

[1] For an admirable discussion of the principle supposed to underlie the doctrine of the Vendors lien and for a collection of authorities, see *Ahrend* v. *Odiorne* (1875) 118 *Mass.* 261 *per Gray, J.*

WICKMAN *v.* ROBINSON.

IN THE SUPREME COURT OF WISCONSIN, 1861.

[14 *Wisconsin* 493.] [1]

Appeal from the circuit court for Dane county. The complaint alleged that the defendant Robinson agreed, in writing, under seal, to convey to the plaintiff a tract of land in return for certain work to be performed by the latter during a period of five years; that the amount agreed to be paid for said services was five hundred dollars; that after the plaintiff had worked under the contract two years and a half, Robinson refused to permit him to proceed further under the agreement; that the value of the services performed was three hundred dollars; that Robinson had, after the recording of the agreement, conveyed to the defendant McBride the forty acres of land which he had agreed to convey to the plaintiff, and had become insolvent; and that the plaintiff had never consented to a rescission of the contract, and would not consent to it until his claim should be paid. The complaint prayed that the sum of three hundred dollars, with interest, might be declared a lien upon said tract of land, and that it be decreed to be sold for its payment. The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and the circuit court sustained the demurrer. Other facts are stated in the opinion.

By Court, PAINE, J. This appeal presents the question whether one who has made a contract for the purchase of real estate, and has paid part of the purchase-money, has an equitable lien on the land for the amount paid, in case a completion of the contract is prevented by the default or wrongful act of the vendor. It must be conceded that there are not many cases where such a right has been sought to be enforced, but the right itself has been frequently recognized by courts, and referred to as established by elementary writers. The following, cited by the appellant's counsel, may serve as illustrations: *Burgess* v. *Wheate,* 1 W. Black. 150; *Mackreth* v. *Symmons,* 15 Ves. 345; *Money* v. *Dorsey,* 7 Smed. & M. 22; *Payne* v. *Atterbury,* Harr. (Mich.) 418; *Willis* v. *Farrar,* 3 You. & J. 264; Miller on Equitable Mortgages, 45 Law Lib. 18, 19.

We can see no reason why such a lien should not exist. All the reasoning by which the vendor's equitable lien for the purchase-money, after conveyance, is established, is applicable in support of the vendee's lien after payment or part payment, and before conveyance. It is difficult to imagine upon what principle a court of equity could enforce the

[1] *S. C.* 80 *American Dec.* 789, and note; and see notes in 12 *American Decisions* 262; and 77 *ib.* 101.

one and deny the other. It is undoubtedly true that the more usual remedy is to enforce a specific performance. But in cases like the present, where the payment is to be made by the performance of particular services for the vendor, and after they are partly performed he refuses to allow them to be completed, it may be doubtful whether a specific performance could be enforced by the vendee; whether he would not be limited to his damages for the non-performance. However that may be, we are satisfied that it is the clear result of equitable principles, that if he chooses to waive every right except the recovery of that which he has paid, he should be held to have a lien on the land for that amount.

The amount to be paid, in a case like this, would be the value of the services actually performed, estimated according to the contract price. The contract having been recorded, the plaintiff is entitled to the same remedy as against the purchaser that he would have if no conveyance had been made: *In re Howe,* 1 Paige, 129; *Keirsted* v. *Avery,* 4 Id. 9; *Hoagland* v. *Latourette,* 1 Green's Ch. 256. That remedy is by a sale of the property to collect the amount due, it being in the nature of a foreclosure: 2 Story's Eq. Jur., sec. 1217.

The demurrer to the complaint should have been overruled. The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

WARMSTREY *v.* TANFIELD.

IN CHANCERY, BEFORE LORD KEEPER COVENTRY, 1629.

[1 *Reports in Chancery* 29.][1]

The Plaintiff's Title appeared to be that one *William Freeman* being Possest of the third part of the Parsonage for the whole Term to come, granted all his Interest therein to one *Alborough* in Trust for the use of the said *William Freeman* and *Alice* his Wife, during their Lives, and after to the use of such issue Male of their two Bodies as the said *William* should by Will appoint, and after the said *Will.* appointed the Premises after the death of the said *Alice* unto *Richard Freeman* Son of the said *William* and *Alice:* And that the said Interest in Law of the said *Alborough* came by mean Conveyance unto *John* and *Robert Palmer,* and that the said *Richard Freeman* during the Life of the said *Alice,* who not long after died, assigned the Premises unto the Plaintiff, and also released to the Plaintiff, and the said *Palmers* assured their Interest in Law in the said Premises to the Plaintiff.

[1] *S. C.* 2 *White and Tudor's Leading Cases in Eq. Pt.* 2, 1530, (*729), with notes.

The Defendant insists for Title, that the said *Richard Freeman* about two years after his Assignment aforesaid to the Plaintiff, made a Lease of the Premises to *Walter Thomas* and *John Makerith* who passed their Estate to one *Evans* and *Hawkins* in Trust for the Defendant the Lady *Tanfield,* and had Possession given her.

This Court with the Judges taking Consideration of the said Assignments, Grants and Release, were of Opinion, and declared, that howbeit a Grant of future Possibility is not good in Law, yet a Possibility of a Trust in Equity might be assigned, and the said *Richard Freeman's* Assignment of his said Trust unto the Plaintiff is also confirmed by the Assignment of the said *Palmer,* who had the Interest in Law, and the said Plaintiffs Assignment is also precedent to the Deed made to the said *Thomas,* by which the said Defendant the Lady *Tanfield* claimeth the said lease.

HOBSON *v.* TREVOR.

IN CHANCERY, BEFORE LORD MACCLESFIELD, 1723.

[2 *Peere Williams* 191.]

The plaintiff *Hobson* was a younger son to lady *Hobson,* and put apprentice to a linen-draper, and under age; the defendant *Trevor* was the eldest son of Sir *John Trevor* late Master of the Rolls, but had incurred his displeasure and was not admitted to his presence, and it was uncertain whether he would inherit any part of his estate.

The defendant Mr. *Trevor* encouraged the plaintiff *Hobson* to court his daughter without the privity of lady *Hobson* the plaintiff's mother, and the defendant *Trevor* before the marriage, gave a bond to the plaintiff *Hobson* dated 8 *Nov.* 1716, in the penalty of 5000 *l.* and in the condition the then intended marriage betwixt the said plaintiff and the defendant's daughter was recited, and that the defendant had agreed, in consideration of the said intended marriage, to settle and assure one third part of all such real estate, as should descend or come to him the said *Trevor* by and upon the decease of his said father the Master of the Rolls, to the use of the plaintiff *Richard Hobson* for life, remainder to the use of *Elizabeth* the defendant's daughter for her life, remainder to the heirs of the body of the said *Elizabeth* by the said plaintiff *Hobson,* the remainder to the right heirs of the said defendant *Trevor* after which came these words, [now the condition of the obligation is, that if the said marriage shall take effect, and the said *Edward Trevor,* shall within three months after the death of his said father, settle and assure one third of all such real estate as shall descend or come to him after his father's death, then the bond to be void.]

The marriage took effect; and soon after Sir *John Trevor* dying intestate, whereby a great real estate came to the defendant as eldest son and heir of his father, the plaintiff and his wife brought their bill for a specific performance of this agreement.

Objected, The plaintiff shall have no more than the penalty of 5000 *l.* and it is a dangerous precedent to suffer an heir apparent to enter into any agreement to dispose of his father's estate before he has it; besides the plaintiff in this case makes no settlement, and it is in the discretion of a court of equity, whether they will execute this or any agreement that is brought before them.

But by *Lord Chancellor:*[1] This is an agreement made upon a valuable consideration, that of the marriage of a child, and therefore fit to be executed in equity. And

It seems the more reasonable, in regard it extends to no more than a third part of the real estate that was to come to the defendant from his father, and this was very hazardous; for if the defendant *Trevor* had died in the life-time of his father, or if there had been a will, the defendant, who was so well known to be under the displeasure of his father, had but an indifferent prospect, so that it might be reasonably thought that the plaintiff at that time, had the worst of the bargain.

As to the plaintiff's making no settlement, it appears he was an infant and the defendant knew him to be so, and consequently that he could at that time make no settlement; probably the plaintiff depended upon his success in trade, as he had been an apprentice to a linen-draper and was left a portion of upwards of 1000 *l.* by his father.

Then it can be no argument to say, that the defendant ought only to pay the penalty of 5000 *l.* because the agreement is recited in the bond, and such agreement was not to be the weaker but the stronger for the penalty; and by the same reason, that had the penalty been higher and beyond the value of a third part of the real estate, in such case the defendant would not have been bound to pay it, so now the penalty being beneath the value of a third part of the real estate, the plaintiff is not bound to accept it; besides, it is to be a settlement for the benefit of the issue of the marriage, and the payment of the 5000 *l.* to the husband would not answer the end, nor provide for such issue.

Wherefore let the agreement be executed *in specie;* saving that a third part of the real estate, which came to the defendant from his father Sir *John Trevor,* must be settled upon the plaintiff *Hobson* and his wife for their lives, remainder to their first, &c. sons in tail male, remainder to their daughters in tail general, remainder to the defendant *Trevor* in fee; and let the defendant account with the plaintiff for mesne profits

[1] In Pannell *v.* Tayler (1823) 1 Tur & R. 101, Lord Eldon termed "Lord Macclesfield a great common lawyer, and Lord Hardwicke a still greater common lawyer." Lord Redesdale, himself no mean judge, declared "Lord Macclesfield an able judge, both in law and equity, as ever sat on the bench." (*Hovenden* v. *Annesley* (1806) 2 *Sch. & Lef.* 632.)

from the end of three months after his father's death, and be examined upon interrogatories touching his father's real estate, and produce all books, papers and writings upon oath, and pay costs.[1]

IN RE GARCELON (1894) 104 *Cal.* 570, 584.[2]—DE HAVEN, J.—The first of these covenants is, in substance and effect, an agreement upon the part of the petitioner to relinquish as heir presumptive his expectancy in that portion of the estate of his aunt to which the agreement related. It is claimed by the petitioner that such an agreement is void under sections 700 and 1045 of the Civil Code of this state, the first of which provides that "a mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind," and the latter section declaring that "a mere possibility, not coupled with an interest, cannot be transferred."

These sections simply state the well-settled and well-understood rule of the common law upon the subject to which they relate. At common law a mere possibility, such as the expectancy of an heir, was

[1] "There are two kinds of possibilities; the one, a bare possibility; that which the heir has from the courtesy of his ancestor, and which is nothing more than a mere hope of succession. Such a possibility undoubtedly is not the object of disposition; for if the heir were to dispose of it during the life of the ancestor, though it afterwards devolved on him from his ancestor, such disposition would be void." Per Lord Kenyon, Ch. J., in Jones *v.* Roe (1789) 3 *T. R.* 88, 93.

In *Carlton* v. *Leighton* (1805) 3 *Meriv.* 667, 671, Lord Chancellor Eldon is reported to have decided "That the expectancy of an heir presumptive or apparent (the fee simple being in the ancestor) was not an interest, or a possibility, nor was capable of being made the subject of assignment or contract; that the cases cited were cases of covenant to settle or assign property which should fall to the covenantor; where the interest which passed by the covenant was not an interest in the land, but a right under the contract; therefore that no interest in the estate in question passed under the bargain and sale of the commissioners."

To this statement of Lord Eldon, Mr. Spence says,—"But a man may make a binding contract, as in *Beekley* v. *Newland*, 2 *P. W.* 182; *Hobson* v. *Trevor* 2 *P. W.* 191, that if he should become possessed of a particular estate, he will execute a security upon it; the interest which passes by the covenant in such case is not an interest in the land till it comes in possession, but a right under the contract: *Duckle* v. *Baines*, 8 *Sim.* 525."—2 *Jurisdiction of the Court of Chancery* 614, *n.* (*c*).

An earlier case than any cited is *Wiseman* v. *Roper* (1646) 1 *Rep. in Ch.* 158, in which the defendant is made to perform specifically an agreement to convey lands that might descend to him, the lands having descended. (On the question of consideration, however, the case seems no longer law.)

[2] S. C. 43 Am. St. Rep. 134, with notes.

not regarded as such an existing interest as to be the subject of a sale or capable of passing by assignment; but in equity the rule was different, and agreements for the sale or release of expectancies, if fairly made and for an adequate consideration, were enforced upon the death of the ancestor; and, in our opinion, it was not the intention of the legislature, in enacting the sections of the code just referred to, to make any change in the rule by which courts of equity were therefore governed in dealing with this class of contracts. This construction of these sections is in harmony with section 5 of the same code, which declares that the provisions of that code, "so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments"; and also follows the presumption that the legislature, in the enactment of statutes, does not intend to overturn long-established principles of law unless such intention is made to clearly appear either by express declaration or by necessary implication.

Mr. Story, in section 1040 *c*, volume 2, of his work on Equity Jurisprudence, states the equitable rule upon the subject of such agreements as the one before us as follows: "So, even the naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale or settlement; and, in such a case, if made *bona fide* for a valuable consideration, it will be enforced in equity after the death of the ancestor; not, indeed, as a trust attaching to the estate, but as a right of contract." And see, also, as sustaining the same proposition, Pomeroy's Equity Jurisprudence, 2d ed., secs. 168, 953; *Bacon* v. *Bonham,* 33 N. J. Eq. 614.

In accordance with this principle it has been held in many cases in which the question has arisen that an heir may release to the ancestor his expected share in the ancestor's estate. Thus, in *Havens* v. *Thompson,* 26 N. J. Eq. 383. It was held that a son, by such release to his father, estopped himself from claiming as heir any portion of the father's estate. In that case it appeared that the father gave to the son the sum of six hundred dollars, upon the condition that it should be accepted in full satisfaction of his interest in the father's estate, the son executing a receipt stating that the money was received "in full in lieu of dowry." The chancellor construed the receipt in view of the facts surrounding its execution as a release, and said: "I regard this instrument as an agreement by which Benjamin, in consideration of the money paid to him by his father, agreed with the latter that he would make no claim to a share of his father's estate should the latter die intestate, but therefrom would be debarred by that instrument made upon what was a satisfactory compensating consideration. Such an agreement may be made between a father and his child in regard to the interest of the latter in the estate of the former, and the effect will be given to it in equity according to the intention of the parties"; and the rule thus declared was afterwards approved in *Brands* v. *De Witt,* 44 N. J. Eq. 545.

In *Bishop* v. *Davenport,* 58 Ill. 105, it was shown that the father in his lifetime gave to certain of his children property, and took from them an instrument in writing in which they acknowledged that such property was received by them as their full share of his estate. The father died intestate, and the court, in passing upon the question, held that the transaction was not an advancement, and that the instrument signed by the children operated as a release by them of their expectancies in their father's estate, and should be upheld as such.

So, also, in *Kershaw* v. *Kershaw,* 102 Ill. 307, a son accepted from his father a deed, the deed reciting that "said land is deeded as an advancement to said John W. Kershaw out of the estate of said Joseph Kershaw, and the deed is accepted by said John as his full share of his father's estate." The court in that case held that the acceptance of the deed bound the son to the same extent as if he had signed it, and that the conveyance did not constitute an advancement, but operated as "an executed contract, whereby an heir released his expectancy in his father's estate in consideration of a present grant of real estate." And it was further there decided that the son was estopped from making any further claim as heir at law to any portion of his father's estate.

In *Crum* v. *Sawyer,* 132 Ill. 443, the court, in a well-considered opinion, held that a husband might, for an adequate consideration, enter into a valid contract with his wife, releasing all his interest as her heir in her lands and personal estate, saying: "There can be no question, then, that the complainant's contingent interest or expectancy as the heir of his wife in her real and personal estate was a proper subject of contract, and the contract in question having been made upon a valuable consideration by parties capable of contracting with each other, and, so far as the evidence shows, with entire fairness, it should, as to such contingent interest or expectancy, be enforced according to its terms." And in *Powers' Estate,* 63 Pa. St. 443, it was decided that a father might make a contract with his child which would bar the latter as his heir at law, and that when property had been received by the son from the father, the son giving a receipt reciting that the same was received in full of his share as heir at law, he was thereby estopped upon the death of the father from claiming any further part of his estate.

Without multiplying authorities upon this point, and many others might be cited to the same effect, it is sufficient to say that we are entirely satisfied with the rule declared in the foregoing cases, and hold that it is competent for an heir under the limitations stated in that rule to relinquish to his ancestor all interest in the estate of the latter which might otherwise in the future vest in him as such heir.

A. B. *v.* J. R.

IN THE EXCHEQUER, BEFORE LORD CHANCELLOR WAYNFLETE, BISHOP OF WINCHESTER, 1459.

[*Year Book, 37 Henry* VI, *folio* 13.][1]

A. B. having bought from J. R. certain debts owing to him from various persons, and given his bond to J. R. for securing the price, prayed in equity to be discharged of the bond, on the ground that debts were *choses in action* and no property passed, and the bargain gave no action, and the debtors still remained the debtors of J. R., and he (A. B.) had nothing for the purchase-money. Thereupon A. B. obtained a subpœna; but inasmuch as the matter was doubtful to the Chancellor [LAWRENCE BOOTH, Bishop of Durham] he adjourned it into the Exchequer Chamber before himself and the judges of both Benches: and all the judges were of opinion that as the plaintiff could not have *quid pro quo,* the obligee ought to release the bond to the plaintiff. Upon this it was ordered in Chancery that the bond should be brought into Court, or that the obligee should make an acquittance or lease to the obligor; and the defendant refusing to do so was committed to the prison of the Fleet until he should choose to comply.

BREVERTON'S CASE.

IN THE EXCHEQUER, 1538.

[*Dyer* 30 b.]

This case was debated in the exchequer: *Breverton,* who was attainted of treason on the last day of *Easter Term,* had certain bonds which were forfeited to the king, and the king granted those bonds to the wife of *Breverton,* without any words to impower the grantee to bring actions upon the bonds in her own name; and yet the wife brings an action, *viz.* an information in her own name upon the bonds; and upon this, there was a demurrer in judgment, because the suit was in her own name; and, Whether it ought to be in the name of the king? was the question. And it was adjudged (*ut audiri*) that the action was well brought, for the king alone may grant a *chose in action.* And for the same reason that he has granted the bonds, which are the substance and foundation of the actions, the law implies that the grantee shall use the means to come at the things granted, &c.[2]

[1] The case is printed as it is translated in 1 *C. P. Cooper's Reports* 515. Mr. Ames gives a less abridged translation of the same case (1 *Cases in Equity Jurisdiction* 1).

[2] "'Twas said for law that the King may grant a thing in action, which is

THE KING *v.* TWINE.

IN THE EXCHEQUER, 1608.

[*Croke's James* 179.]

Upon demurrer, the case was, That one *George York* recovered against *John Allen* four thousand pounds damages in an action on the case. Afterwards *George York,* being outlawed in a personal action, died; and queen *Elizabeth,* in the thirty-fourth year of her reign (reciting that he was outlawed and dead), granted all his goods, chattels, and debts to *Francis Anger,* to the use of *Mary York.* Afterwards *Francis Anger,* by deed, assigned that debt and judgment to *Christopher Twine:* and notwithstanding, an extent issued in the king's name, to extend all the lands which the said *John Allen* had at the time of the judgment; and the lands in the possession of *Thomas Twine,* which he purchased after the judgment, were extended. Thereupon he, as terre-tenant, pleaded against this extent, to be discharged thereof, it being upon assignment made 34. *Eliz.* by the queen; whereas by the assignment made by *Anger* to *Twine,* he is chargeable to him only, and not to the king. It was thereupon demurred, and argued divers times in the exchequer. The principal question was, Whether, after the assignment of this debt by queen *Elizabeth,* the king may extend in his own name for the benefit of the patentee, and the patentee thereby have the suit in the king's name? And ALL THE BARONS, after the argument at the bar, resolved, that as the king's grant of a thing in action is good enough, so this debt, which is forfeited to the king by the outlawry of *York,* is well granted; and the grantee may have the benefit to levy this debt by action in his own name, or by extent in the king's name, altho' he hath not any words in his grant to sue it in the name of the king, as is usual in such cases. But the assignment over of this debt by *Francis Anger* (the king's patentee) to *Christopher Twine,* is merely void; for there cannot by law be any assignment made by a common person of this debt.[1] It was therefore adjudged, that the plea was ill, and no cause of discharge; and that the land should remain in extent for the king. *Vide* 4. *Hen.* 8. *Dyer, fol.* 1. *and fol.* 30. *Breton's Case,* 39. *Hen.* 6. *pl.* 26.

personal: as debt, and damages, and the like, or a thing mixed; as the ward of body; but not a thing real, as an action of land, and the like, as Rights, Entries, Actions, and the like which *Abbots* might have, (and that the King shall have these by the Statute of dissolution of *Abbies* 31. H. 8.) These things in action the King cannot grant. * * * 33. H. 8. B. Pattents 98." Brooke's New Cases, March's Translation, 34.

[1] " Here Littleton reciteth one of the maxims of the common law; and the reason hereof is, for avoyding of maintenance, suppression of right, and stir-

CROUCH *v.* MARTIN *and* HARRIS.

IN CHANCERY, BEFORE LORD KEEPER COWPER, 1707.

[2 *Vernon* 595.]

The plaintiff lent *Arthur Harris,* late husband of the defendant, 100l. on *Bottom-Rhea;* and as a farther security assigned to the plaintiff the wages, that would become due to him in the voyage to the *Indies,* as chirurgeon of the ship at 4l. 10s. *per* month; the ship returned safe to *London,* and 145l. became due on the *Bottom-Rhea* bond. *Arthur Harris* died in the voyage; the defendant, his widow, took out administration; and there being a bond given by her husband on her marriage to leave her 400l., if she survived him, she confessed judgment thereon, and insisted *that* judgment ought to be first paid, and the wages due to the husband applied to that purpose.

Per Cur. Seamen's wages are assignable; and the assignment specifically binds the wages; and in truth the advancing the 100l. on the credit of the wages is, as it were, paying the wages before hand; and the seaman or his widow must not have his wages twice.

It is a *chose en action,* being due by contract, although the service not then done, and a *chose en action* is assignable in equity upon a consideration paid.[1]

ring up of suites, and therefore nothing in action, entrie, or re-entrie, can be granted over; for so under colour thereof pretended titles might bee granted to great men, whereby right might bee trodden downe, and the weake oppressed, which the common law forbiddeth, as men to grant before they be in possession."—*Co. Lit.* 214*a*.

[1] "Though the law does not admit an assignment of a *chose in action,* this Court does; and any words will do, no particular words being necessary thereto."—*Per Lord Hardwicke in Row* v. *Dawson* (1749) 1 *Ves. Sr.* 331, 332. The same high authority in a case a little later said: "There was a wise reason in the law's not allowing a right to sue to be assigned, that it tended to *champerty* and *maintenance* to pass debts into the hands of the more powerful to oppress lower people. Yet it is now established in this court, that a *chose in action* may be assigned for a valuable consideration." *Wright* v. *Wright* (1749-50) 1 *Ves. Sr.* 409, 411.

"That a debt, or other *chose in action,* may be assigned in equity without any concurrence on the part of the debtor, and that no particular words are necessary, have been settled by a long series of decisions." *Per Sir John Romilly in Bell* v. *R. R. Co.* (1852) 15 *Beav.* 548, 552.

It may be of interest to note that Cowper was the first Chancellor to hold the great seal after the union of England and Scotland in 1707. He is therefore the first Lord Chancellor of Great Britain. While deficient in logical faculty and grasp of law as a science, Pope and Chesterfield considered him a consummate orator. His namesake and kinsman, William Cowper, will always associate the name with literature.

PARKER *v.* LILLY.

IN THE QUEEN'S BENCH, 1712.

[10 *Modern* 102.]

A man assigns his bond to *B.* *B.* sues this bond in the name of the assignor, and has judgment. On a writ of error brought, the judgment is affirmed; and after execution is taken out, but before it was returned, the assignor gives a warrant of attorney to confess satisfaction upon record, which is accordingly done, and upon this *a supersedeas* is taken out to stop the execution.

It was moved to set aside the *supersedeas,* because after assignment the Court will not suffer the assignor to give a warrant of attorney to acknowledge satisfaction; and for this 1. *Keble,* 803. was quoted.

But, as to this, it was said, that the assignment was matter of equity, and was more proper for chancery than for this court; and a late case was quoted in the common pleas, where a bond was taken in trust for another, and the obligee dying while the suit upon this bond pended, it was held that the *cestuy que trust* could not go on in the action, because this Court could not take notice of the trust, or of any other plaintiff than who appeared to be so upon record.

And of this opinion was THE COURT.

IT WAS FURTHER INSISTED, in favour of the motion, that after execution was gone out, it was not regular to grant a *supersedeas* without a Judge's hand.

THE COURT took time to inquire into the practice.

LEGH *v.* LEGH.

IN THE COMMON PLEAS, 1799.

[1 *Bosanquet and Puller* *447.]

On a former day, *Shepherd,* Serjt, shewed cause against a rule *Nisi* obtained by *Le Blanc,* Serjt. for setting aside a plea of release in an action on a bond, and ordering the release to be cancelled.

The case as disclosed by the affidavits in support of the rule appeared to be this: *Frances Legh* having giving a bond to *Sarah Legh* to secure 75l. *Sarah* assigned it to *John Legh* as a security for the payment of a lesser sum, of which *Frances* had notice: *John* having brought an action on the bond against *Frances* in the name of *Sarah, Sarah* gave a release to *Frances* by whom she had been satisfied her debt, and this release was pleaded.

EYRE, Ch. J.[1] The conduct of this Defendant has been against good faith, and the only question is, whether the Plaintiff must not seek relief in a Court of Equity? The Defendant ought either to have paid the person to whom the bond was assigned, or have waited till an action was commenced against him, and then have applied to the Court. Most clearly it was in breach of good faith to pay the money to the assignor of the bond and take a release, and I rather think the Court ought not to allow the Defendant to avail himself of this plea, since a Court of Equity would order the Defendant to pay the Plaintiff the amount of his lien on the bond, and probably all the costs of the application.

BULLER, J. There are many cases in which the Court has set aside a release given to prejudice the real Plaintiff. All these cases depend on circumstances. If the release be fraudulent, the Court will attend to the application.

The Court recommended the parties to go before the prothonotary in order to ascertain what sum was really due to the Plaintiff on the bond.

Shepherd, on this day, stated, that the Defendant objected to going before the prothonotary, upon which the *Court* said, that the rule must be made absolute. He then applied for leave to plead payment of the bond, and contended, that as this was not an application under the Statute to plead several pleas, the Court had no discretion.

EYRE, Ch. J. The Court has in many cases refused to allow a party to take his legal advantage, where it has appeared to be against good faith. Thus, we prevent a man from signing judgment who has a right by law to do so, if it would be in breach of his own agreement. In order to defeat the real Plaintiff, this Defendant has colluded with the nominal Plaintiff to obtain a release; and I think therefore the plea of release may be set aside consistently with the general rules of the Court. And if so, the Defendant cannot be permitted to plead payment of the bond, as that would amount to the same thing.

BULLER, J. The Court proceeds on the ground, that the Defendant has in effect agreed not to plead payment against the nominal obligee.

Upon this the Defendant consented to go before the prothonotary.[2]

[1] "A name that has great authority with me * * * His judgments were very elaborate, and generally in writing; and when the energy of mind which he applied to them is considered, I am surprised that it could be supposed that he had contradicted himself and decided differently in the two cases. I think that upon an attentive perusal, they will be found to be reconcilable." *Per Lord Eldon* in *Busk* v. *Lewis* (1821) 1 *Jac. Ch.* 369.

[2] In *Andrews* v. *Beecker* (1800) 1 *Johns. Ca.* 411, in an action of *debt* on a bond conditioned to execute a certain deed therein mentioned, it was resolved, Per Curiam, that "a release after the assignment of the bond and notice to the defendant, is a nullity, and ought not to be regarded." And see the elaborate note of the reporter, Mr. Shepard, in the second edition of Johnson's Cases.

THALLHIMER *v.* BRINCKERHOFF (1824) 3 *Cowen* 623, 645.—*The Chancellor* [*Sanford*]. It was a principle of the common law, that a right of action could not be transferred by him who had the right, to another. When we seek the reason of this rule, we find it in the motive already mentioned, an apprehension that justice would fail, and oppression would follow, if rights of action might be assigned. "Nothing," says Coke, Co. Lit. 114 a.; "nothing in action, entry or re-entry, can be granted over; for so, under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed." Feeble, partial, and corrupt, must have been the administration of justice, where such a reason could have force. In early times, this rule concerning rights of action was rigorously enforced. As the entire right of action could not be assigned, so no part of it could be transferred, and no man could purchase another's right to a suit, either in whole, or in part. Hence, the doctrine of maintenance which prohibits contracts for a part of the thing in demand, was adopted as an auxiliary regulation, to enforce the general principle which prohibited the transfer of all rights of action. But the rule of the common law, that rights of action can not be assigned, has in modern times been reversed; the apprehension, that justice would be trodden down, if property in action should be transferred, is no longer entertained; and the ancient rule now serves only to give form to some legal proceedings. In the courts of equity, this rule was never followed; and those courts have always considered and treated the rule as unjust, and have supported assignments of rights of action. Experience has fully shewn, not only, that no evil results from the assignment of rights of action, but that the public good is greatly promoted by the free commerce and circulation of property in action, as well as of property in possession.

The general law, both in England and here, now is, that rights of action may be transferred; and as the laws concerning maintenance are still in force, the present state of the law is, that while an entire right of action may be transferred to a purchaser, with complete effect, a contract to transfer a part of a right of action, is void. The primary rule forbidding the assignment of a right of action, has ceased; but the auxiliary sanction concerning the assignment of a part of such a right, remains in force. The English judges feeling that the original reasons for the law of champerty and maintenance, had ceased, have gradually mitigated that law, by interpretation and exceptions; and the present state of English opinion on this subject, may be seen in 4 D. & E. 340, 341; where Buller, justice, expresses himself in terms which do not disguise his contempt for the whole doctrine of maintenance.

In many of the states of this union, these laws are not in force; and the want of them, is said to be no inconvenience.[1]

[1] Perhaps the best illustration of the triumph of equity over law in the matter of non-existent property or of future rights is to be found in the mortgage of after acquired property: *Holyroyd* v. *Marshall* (1861) 10 *H.*

SECTION 2. INADEQUACY OF LEGAL REMEDY.

A. *Inadequacy of Legal Damages.*

PUSEY *v.* PUSEY.

IN CHANCERY, BEFORE LORD KEEPER NORTH,[1] 1684.

[1 *Vernon* 273.]

Bill was, that a *horn,* which time out of mind had gone along with the plaintiff's estate, and was delivered to his ancestors in ancient time to hold their land by, might be delivered to him; upon which *horn* was this inscription, viz. *pecote this horne to hold huy thy land.*

The defendant answered as to part, and demurred as to other part; and the demurrer was, that the plaintiff did not by his bill pretend to be intitled to this *horn,* either as executor or devisee; nor had he in his bill charged it to be an *heir loome.*

The demurrer was over-ruled, because the defendant had not fully answered all the particular charges in the bill, and was ordered to pay costs. And the *Lord Keeper* was of opinion, that if the land was held by the tenure of a *horn* or *cornage,* the heir would be well intitled to the *horn* at law.

PEARNE *v.* LISLE.

IN CHANCERY, BEFORE LORD HARDWICKE, 1749.

[*Ambler* 75.]

Order for *Ne exeat regno* was made on 18th *April,* 1748, till answer and further order, and to be marked 500*l.* on affidavit to the following effect: That plaintiff was entitled to fourteen Negroes at *Antigua:* that his agent let them to defendant for hire, at a yearly rent which amounted

L. C. 191; *Tailby* v. *Official Receiver* (1888) *L. R.* 13 *App. Cas.* 523. In these cases the authorities and history of the doctrine are carefully examined. *Brett* v. *Carter,* (1875) 2 *Low.* 458 gives Federal view; *Moody* v. *Wright* (1847) 13 Met. 17; *Rochester Distilling Co.* v. *Rasey* (1894) 142 *N. Y.* 570; *Central Trade Co.* v. *West India Co.* (1901) 168 *N. Y.* 314 give the modified common law obtaining in some jurisdictions.

[1] The lord keeper has been lauded to the skies, by his brother Roger North, and on the other hand consigned to the bottomless pit by Lord Campbell in his "Lives of the Lord Chancellors." The truth is as often the golden mean between the extremes. North was of the earth, earthy, but as a lawyer he was held in great and deserved respect. A decision of his—*Newcomb* v. *Bonham* (1681-84) 1 *Vern.* 7, 214, 232, overruling Lord Nottingham—has stood the test of time and criticism, than which there can be no greater praise.

to 100*l.* *Antigua* money: that the defendant refuses to pay for two years service, which is of the value of 100*l.* Sterling, and also refuses to deliver the Negroes to plaintiff's agent; that defendant has declared he intends to leave *England* soon and go to *Antigua:* that plaintiff has no remedy at law, his witnesses being abroad, and therefore filed his bill in this Court.

On motion to discharge this order, Lord *Hardwicke,* C. declared the rule of the Court to be, not to grant a *Ne exeat regno* on a mere legal demand for money; if it is of such a value, the defendant may be arrested, and obliged to give bail, who will be liable unless they surrender him; and he may be as easily taken by that process as on a *Ne exeat regno.* The almost only exception to that rule is in the case of alimony decreed by the Spiritual Court; that court cannot take bail, and therefore this Court will lend its assistance in favour of the woman.

On consideration of the nature of the demand, the merits of the case, and the person of the defendant, and the place he is going to, which are all the reasons given for granting this writ, I will discharge the order.

1st, As to the nature of the demand. It is for the use of Negroes. A man may hire the servant of another, whether he be a slave or not, and will be bound to satisfy the master for the use of him. I have no doubt but trover will lie for a Negro slave; it is as much property as any other thing. The case in *Salk.* 666. was determined on the want of proper description. It was trover *pro uno Æthiope vocat. Negro,* without saying slave; and the being Negro did not necessarily imply slave. The reason said at the bar to have been given by Lord Chief Justice *Holt,* in that case, as the cause of his doubt, *viz.* That the moment a slave sets foot in *England* he becomes free, has no weight with it,[1] nor can any reason be found, why they should not be equally so when they set foot in *Jamaica,* or any other *English* plantation. All our colonies are subject to the laws of *England,* although as to some purposes they have laws of their own. There was once a doubt, whether, if they were christened, they would not become free by that act, and there were precautions taken in the Colonies to prevent their being baptised, till the opinion of Lord *Talbot* and myself, then Attorney General and Solicitor General, was taken on that point. We were both of opinion, that it did not at all alter their state. There were formerly villains or slaves in *England,* and those

[1] "See *Contra Somersett* v. *Stewart Lofft, p.* 1. *S. C.* 20. *How. S. Tr.* 1. See Mr. Hargrave's argument in this case, *Harg. St. Tr. H. Vol.* 339. *Sharley* v. *Harvey,* 2 *Eden* 126. See *Williams* v. *Brown* 3 *Bos. & P.* 69. See Lord Stowell's judgment in the matter of a slave woman called Grace, delivered in the Admiralty Court, 6 Nov. 1827, in which case his Lordship held, that a slave returning to the colony where she had been in slavery, was, notwithstanding her having been born in England, still liable to all the disabilities of slavery." Reporter's note to 2d Edition.

The American student will find the case of *Lemmon* v. *People* (1860) 20 *N. Y.* 562 of great interest. Wm. M. Evarts and Chas. O'Connor appeared respectively for and against the slave.

of two sorts, regardant and in gross; and although tenures are taken away, there are no laws that have destroyed servitude absolutely. Trover might have been brought for a villain. If a man was to come into a court of record and confess himself villain to another (which was one way of being a villain), what the consequence would be I will not say, but there is no law to abolish it at this time.

As to the merits, a specific delivery of the Negroes is prayed; but that is not necessary, others are as good; indeed in the case of a cherry-stone, very finely engraved, and likewise of an extraordinary wrought piece of plate, for the specific delivery of which bills were brought in this Court, they could not be satisfied any other way; their value arose on circumstances peculiar to themselves: but in others, as diamonds, one may be as good as another. The Negroes cannot be delivered in the plight in which they were at the time of the demand, for they wear out with labour, as cattle or other things; nor could they be delivered on demand, for they are like stock on a farm, the occupier could not do without them, but would be obliged, in case of a sudden delivery, to quit the plantation.

The person of the defendant is amenable, for he is a native of *Antigua;* he is going to *Antigua;* his effects, and likewise the Negroes, are there, and have been used in that place. It is a colony subject to *England,* and the plaintiff may have justice done him in the Courts there.

HENDERSON *v.* VAULX (1836) 10 *Yerger* (18 *Tenn.*) 29, 37.—REESE, J.—It is but recently, in this state at least, that the peculiar nature and character of slave property, and of the relation between master and slave, have been regarded in our courts in the spirit of a rational and humane philosophy. A few years ago, and any man who had a judgment debtor, might by virtue of an execution against him, become the owner of the slave of a third party, if he chose in a suit at common law, to pay the value or more than the value. A court of chancery, if the owners had there sought to restrain the bill, or recover the possession, closed its doors upon him, with the information given him, that he had a clear and unembarrassed remedy at law. Afterwards it was discovered as wines, family pictures and plate, and ornamental trees, &c. were protected to the owner in a court of chancery against trespass, so might a slave, if a family slave, and a peculiar favorite with his master. But recently, upon grounds less technical and far higher and sounder, it has been determined that a court of chancery will protect the possession and enjoyment of this peculiar property, a property in intellectual and moral and social qualities, in skill, in fidelity and in gratitude, as well as in their capacity for labor; and any owner may now say and show to a court of chancery, I am master, this is my slave, and he shall retain or recover the possession. These principles, founded upon the nature of the property, will necessarily embrace the rights and liabilities affecting the present

and future owners, the party in possession and the party in remainder. The remainder man is owner, and entitled to be secured in the specific slaves and their increase, and not merely in their value, or even more than their value. If the owner for life may remove with the negroes to Mississippi or Louisiana, how is the remainder to be secured? It is answered, by a bond with security here, to have the negroes forthcoming at the death of the remainder man. Without urging how precarious such security would be, after the lapse of some twenty or thirty years, by the death of sureties, the operation of our statutes of descents and distributions, and the commercial and ever changing character of our country; without insisting how improbable it would be that those in remainder would get any available remedy upon the bonds, let us suppose that in this case a bond with ample security shall be taken, that the defendant, his wife, and his negroes go to his farm in Mississippi, and that contrary to the probability of the case, the wife dies in a short time, while the sureties are yet good. The complainants want the negroes specifically, they are favorite negroes, family negroes, at all events they wish the possession of them, how should they recover it? They can only sue upon the bond. In that bond they will not recover the negroes, but their value here, or their value in Mississippi, but probably the former; but suppose the latter, the defendants in exoneration of his sureties pays the money here, as he, needing the negroes would be sure to do, and then the matter ends in a compulsory sale through the agency of this court, and a court of law. If complainants sue in Mississippi will they recover the negroes specifically; we know not their system of laws. This single view of the subject seems to be decisive. When the negroes leave this state and go beyond the jurisdiction of its laws, we have no further control over them; they may be hired, sold, emancipated, and dispersed through every slaveholding or non-slaveholding state in the Union, or out of the Union. And if, as matter of right the life estate owner can give the bonds and go where he pleases with the negroes, for it results in that, if he remove where we direct or permit him, he may afterwards remove a dozen times; if he can do this of right, then every owner of a life estate can, by giving bond, compel those in remainder hereafter to receive, if they can recover indeed, the money value of their negroes. There are many other views leading to the same results. Our state constitution prohibits the emancipation without compensation to the owner. If the negroes are taken to a state where the fundamental law differs, the title is less secure. The complainants are members of this political community, and have a voice in the formation of its laws; if removed, their slaves would be under a system of laws; in the formation of which they would have no voice. We have a mild penal code, as regards slaves, as well as others; they might be taken where this would be otherwise. We have a much greater portion of free than of slave population; and the slave, without severity, is kept in a due and safe subordination; they might be taken where the proportion is the other way, and where weakness on one side and rashness

on the other, might lead to insurrection and consequent destruction of the slave. Here there is a liberal philanthropy and protective public sentiment to the slave—there it might be otherwise. Here the annual profit of the slave's labor bears no very large proportion to his own value, and of course interest is on the side of humanity, and he may not be overworked—there the annual profit may be one third of his entire value, and the temptation would be to overwork him. Here the moderate annual profit of the slave's labor makes an increase of the stock an object, and mothers and children are tenderly treated—there a different state of things may produce a different feeling and a different course. Here we have a temperate, healthful climate—there the climate may be less favorable to life. Here, those in remainder could know the state and condition of the property, ascertain whether it was humanely or cruelly treated, be informed of its increase, preserve the evidences of its identity, and their ownership—there, unless they should remove thither, they would be ignorant of all these subjects, and that ignorance would peril their title and interest in the property.[1]

McGOWIN *v.* REMINGTON.

IN THE SUPREME COURT OF PENNSYLVANIA, 1849.

[12 *Pennsylvania State* 56.]

The complainant's bill alleged that he was formerly a surveyor in the City of Pittsburg; that he deposited with the defendant, a trusted employee, certain surveyor's maps, charts, and instruments, with the understanding that the defendant, who contemplated taking up the business of surveying and whom the complainant desired to help in so doing, should use the same and then return them to the complainant on his demand, the latter intending to resume his business of surveyor at some future time. The complainant after some time demanded from the defendant the loaned maps, charts, and instruments. The defendant refused to return them, asserting that there were some which he could not do without. The bill then prayed that the defendant McGowin be decreed to deliver up to the complainant the said plots, &c., and any copies thereof made since demand, and further prayed an injunction to restrain McGowin from copying, and from destroying, or injuring, or secreting said plots, &c.[2]

The opinion of this Court was delivered by

BELL, J.—The defendant having failed to sustain, by proof, his alle-

[1] The same subject is well discussed in an earlier decision in the same court, by Carton, Ch. J., in *Loftin* v. *Espy* (1833) 4 *Yerger* (12 *Tenn.*) 84. In Pomeroy's Specific Performance of Contracts §12, will be found collected a great number of cases involving the same question.

[2] The statement of facts has been abridged.

gation of sale or gift of the articles sought to be recovered by this bill, the contest in this Court is reduced to two questions: first, whether the bill presents sufficient grounds to warrant the interference of a Court of Equity, in this state, under the statute conferring equitable jurisdiction? Secondly, whether that portion of the decree which covers the surveying instruments and furniture described in the exhibits annexed to the bill can be sustained?

As to the first point: the defendant insists that the only remedy is at law. Though the action of replevin is, with us, a broader remedy than in England, lying in all cases where one man improperly detains the goods of another, it is in no instance effective to enforce a specific return of chattels, since a claim of property and bond given is always sufficient to defeat reclamation, no matter what may be the eventual issue of the contest. As, therefore, our common-law tribunals are as powerless for such a purpose, as the similar English Courts, the propriety of exerting the equitable jurisdiction now invoked must depend with us on the same reasons that are deemed sufficient to call it into action there. Here, as there, the inquiry must be whether the law affords adequate redress by a compensation in damages, where the complaint is of the detention of personal chattels. If not, the aid of a Court of Chancery will always be extended to remedy the injury, by decreeing a return of the thing itself.

The precise ground of this jurisdiction is said to be the same as that upon which the specific performance of an agreement is enforced, namely, that fruition of the thing, the subject of the agreement, is the object, the failure of which would be but illy supplied by an award of damages: Lowther *v.* Lowther, 13 Ves. 389. In the application of this rule some difficulty has been experienced. The examples afforded by the English books are usually those cases, where, from the nature of the thing sought after, its antiquity, or because of some peculiarity connected with it, it cannot easily, or at all, be replaced. Of these may be instanced, the title-deeds of an estate and other muniments of property; valuable paintings: Lowther *v.* Lowther, *supra;* an antique silver altar-piece: Duke of Somerset *v.* Cookson, 3 P. Wms. 389; an ancient horn, the symbol of tenure, by which an estate is held: Pusey *v.* Pusey, 1 Ves. 273; heir-looms: 3 Ves. & B. 18; and even a finely carved cherry-stone: Ambler, 77. Such articles as these are commonly esteemed not altogether, or perhaps at all, for their intrinsic value, but as being objects of attachment or curiosity, and, therefore, not to be measured in damages by a jury, who cannot enter into the feelings of the owner; so too the impossibility, or even great difficulty of supplying their loss, may put damages out of the question as a medium of redress. But these are not the exclusive reasons why Chancery interferes, for there may be cases in which the thing sought to be recovered is susceptible of reproduction or substitution, and yet where damages could not be so estimated as to cover present loss or compensate its future consequent inconvenience. And

I take it this is always so, where, from the nature of the subject or the immediate object of the parties, no convenient measure of damages can be ascertained; or, where nothing could answer the justice of the case but the performance of a contract in specie. Of this Buxton *v.* Lister, 3 Atk. 384, furnishes an example in the analogous instance of a contract for the sale of personalty: contracts, which are most commonly left to be dealt with at law. It was a bill to enforce the performance of an agreement for the purchase of several large parcels of growing wood, to be severed by the defendants, who were to have eight years to dispose of it and to pay for it, in six yearly instalments. Lord Hardwicke was, at first, extremely reluctant to entertain the bill, but after discussion came to the conclusion, that, though relating to a personal chattel, it was such an agreement that the plaintiff might come into Chancery for a specific performance. He instanced the case of Taylor *v.* Neville, which was a bill for the performance of articles for the sale of eight hundred tons of iron, to be paid for in a certain number of years, by instalments, where the decree prayed for was made; and proceeded to observe—"such sort of contracts as these, differ from those that are immediately to be executed. There are several circumstances which may concur. A man may contract for the purchase of a great quantity of timber, as a ship-carpenter, by reason of the vicinity of the timber; and this is on the part of the buyer. On the part of the seller, suppose a man wants to clear his land in order to turn it to a particular sort of husbandry; there nothing can answer the justice of the case but the performance of the contract in specie." Similar in principle is the case of Falls *v.* Reid, 13 Ves. 70, where the plaintiffs prayed the restoration of an engraved silver snuff-box, used for many years by a society, as the symbol of their association; and Nutbrown *v.* Thomson, where a tenant brought a bill against his lessor, who, under pretence of the tenant's covenant, had repossessed himself of the land, and seized upon the stock and cattle, which by the lease the tenant was to enjoy for seven years. The objection was that the tenant's remedy, if he was entitled to one at all, was at law, in damages. But how, asked Lord Eldon, are damages to be estimated in such a case? The direction to a jury must be to give, not the value of the chattels, but their value to the tenant! A similar question may well be propounded in our case. By what standard would you measure the injury the plaintiff may sustain *in future* from being deprived, even for a brief period, of the use of papers essential to the prosecution of his business? Their intrinsic value might, perhaps, be ascertained by an estimate of the labour necessary to their reproduction, admitting the means to be at hand, and within the power of the plaintiff. But how could a tribunal ascertain the probable loss which, in the mean time, might be sustained? The present pecuniary injury might be little or nothing, and so possibly of the future; or it might be very great, depending upon the unascertainable events of coming time, as these may be influenced by the misconduct of the defendant. These considerations

show, I think, the case is not one for damages. Besides, as many of the maps, plans, surveys, and calculations are said to be copies of private papers, we are by no means satisfied they could be replaced at all. Certainly not without permission of the owners; a risk to which the plaintiff ought not unnecessarily to be exposed. If to these reflections we add the fact that some of these documents are the original work of the plaintiff, of value as being predicated upon data possibly no longer accessible, a wrong is perpetrated which a chancellor ought not to hesitate in relieving. It is enough for this purpose, that a perfect relief at law is not apparent. The thing to be guarded against is, not the invasion of defendant's rights, for he stands here absolutely without any, except the common interest every citizen has in preserving the proper line of distinction that divides the jurisdiction and limits the powers of the several Courts. What is to be avoided is an unnecessary trespass upon the province of the common-law tribunals, and this is to be tested by the simple query whether they offer a full remedy for the wrong complained of?

But there is another ground upon which this proceeding may be sustained. In Falls *v.* Reid, the snuff-box was deposited with the defendant, as a member of the society, upon certain terms, to be redelivered upon the happening of certain events. Lord Rosslyn held that under these facts, the defendant was a depositary on an express trust which, upon a common ground of equity, gave the plaintiff title to sue in that Court; and in this he was supported by Lord Eldon, in the subsequent case of Nutbrown *v.* Thornton. According to the proof in our case, the papers and documents claimed were left with the defendant under the express understanding that they were to be redelivered whenever the plaintiff should see fit to resume the business of his then profession in this city. It is then the case of direct confidence violated—a spell sufficiently potent to call into vigorous activity the authority invoked.

As to the second question, it is perhaps enough to say, that when once a Court of equity takes cognizance of a litigation, it will dispose of every subject embraced within the circle of contest, whether the question be of remedy or of distinct yet connected topics of dispute. If the jurisdiction once attaches from the nature of one of the subjects of contest, it may embrace all of them, for equity abhors multiplicity of suits. Thus in the case last cited, the Chancellor ruled that where a person is found wrongfully in possession of a farm, over which the Court had undoubted power, and also in possession of the stock upon it, at the same time and under the effect of the same wrong, the Court will undoubtedly make him account for and deliver back the whole. In the case at bar the surveying instruments and office furniture stand in the same category with the maps, drafts, &c.; were delivered to the defendant at the same time, and are withheld by an exertion of the same wrong. In short, they enter into and make part of the same transaction, and may, therefore, be the objects of the same measure of redress. Decree affirmed.

WHEELOCK *v.* NOONAN.

IN THE COURT OF APPEALS OF NEW YORK, 1888.

[108 *New York* 179.]

Appeal from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 6, 1886, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. Reported below, 21 J. & S. 286.

This action was brought to compel defendant to remove from certain lots belonging to plaintiff, situate in the city of New York, a quantity of rocks or boulders placed thereon by defendant.

The material facts are stated in the opinion.

FINCH, J.[1] The findings of the trial court establish that the defendant, who was a total stranger to the plaintiff, obtained from the latter a license to place upon his unoccupied lots in the upper part of the city of New York a few rocks for a short time, the indefiniteness of the period having been rendered definite by the defendant's assurance that he would remove them in the spring. Nothing was paid or asked for this permission and it was not a contract in any just sense of the term, but merely a license which by its terms expired in the next spring. During the winter, and in the absence and without the knowledge of plaintiff, the defendant covered six of the lots of plaintiff with "huge quantities of rock," some of them ten or fifteen feet long, and piled to the height of fourteen to eighteen feet. This conduct was a clear abuse of the license and in excess of its terms, and so much so that if permission had been sought upon a truthful statement of the intention it would undoubtedly have been refused. In the spring the plaintiff, discovering the abuse of his permission, complained bitterly of defendant's conduct and ordered him to remove the rocks to some other locality. The defendant promised to do so, but did not, and in the face of repeated demands has neglected and omitted to remove the rocks from the land.

The court found as matter of law from these facts that the original permission given did not justify what was done either as it respected the quantity of rock or the time allowed; that after the withdrawal of the permission in the spring and the demand for the removal of the rock the defendant was a trespasser, and the trespass was a continuing one

[1] This learned judge, like his contemporary Bowen on the other side of the water, cultivated literature on the bench and expressed himself in an English of purity, delicacy and force. While literature and law are so constantly divorced, it is agreeable betimes to chronicle their union. It will doubtless please the student to learn that Judge Finch is the author of "The Blue and the Gray"; and that he was for many years Dean of the College of Law of Cornell University.

which entitled plaintiff to equitable relief; and awarded judgment requiring defendant to remove the rocks before March 15, 1886, unless for good cause shown the time for such removal should be extended by the court. The sole question upon this appeal is whether the relief granted was within the power of the court, and the contention of the defendant is mainly based upon the proposition that the equitable relief was improper since there was an adequate remedy at law. The plaintiff objects that no such defense was pleaded. If it arises upon the facts stated in the complaint, it can scarcely be said to be new matter required to be stated in the answer, and I doubt whether under the present system of pleading the technical objection in such case is good. It is better, therefore, to consider the defense which is interposed.

One who would justify under a license or permission must bring his acts within the terms of the license. He exceeds them at his peril. There is no equity in allowing him to strain them beyond their fair and reasonable interpretation. The finding shows permission asked for "a few stone," described as "a portion" of what defendant was getting from the boulevard. The plaintiff was justified in inferring that for the bulk of his stone the defendant had a place of deposit and only wanted additional room for a small excess, for a few stone. Under this permission defendant was not justified in covering six lots with heavy boulders to a height of fourteen to eighteen feet. The thing done was gravely and substantially in excess of the thing granted, and the license averred does not cover or excuse the act. Beyond that the permission extended only to the spring of 1880 and expired at that date. The immediate removal of the stone was then demanded, and from that moment its presence upon plaintiff's lands became a trespass, for which there was no longer license or permission. Such parol license, founded upon no consideration, is revocable at pleasure, even though the licensee may have expended money on the faith of it. Murdock *v.* Pros. Park & Coney I. R. R. Co., 73 N. Y. 579. And this was a continuing trespass. So long as it lasted it incumbered the lots, prevented their use and occupation by the owner, and interfered with the possibility of a sale.

It is now said that the remedy was at law; that the owner could have removed the stone and then recovered of the defendant for the expense incurred. But to what locality could the owner remove them? He could not put them in the street; the defendant presumably had no vacant lands of his own on which to throw the burden; and it would follow that the owner would be obliged to hire some vacant lot or place of deposit, become responsible for the rent, and advance the cost of men and machinery to effect the removal. If any adjudication can be found throwing such burden upon the owner, compelling him to do in advance for the trespasser what the latter is bound to do, I should very much doubt its authority. On the contrary, the law is the other way. Beach *v.* Crane, 2 N. Y. 86, 97. And all the cases which give to the injured party successive actions for the continuance of the wrongs are inconsistent with

the idea that the injured party must once for all remove it. Such is neither an adequate remedy nor one which the plaintiff was bound to adopt.

But it is further said that he could sue at law for the trespass. That is undoubtedly true. The case of Uline *v.* New York Central and Hudson River Railroad Company, 101 N. Y. 98, demonstrates upon abundant authority that in such action only the damages to its date could be recovered, and for the subsequent continuance of the trespass, new actions following on in succession would have to be maintained. But in a case like the present would that be an adequate remedy? In each action the damages could not easily be anything more than the fair rental value of the lot. It is difficult to see what other damages could be allowed, not because they would not exist, but because they would be quite uncertain in amount and possibly somewhat speculative in their character. The defendant, therefore, might pay those damages and continue his occupation, and, if there were no other adequate remedy, defiantly continue such occupation, and, in spite of his wrong, make of himself, in effect, a tenant who could not be dispossessed. The wrong in every such case is a continued unlawful occupation, and any remedy which does not or may not end it, is not adequate to redress the injury, or restore the injured party to his rights. On the other hand, such remedy in a case like the present might result to the wrong-doer in something nearly akin to persecution. He is liable to be sued every day, *die de diem,* for the renewed damages flowing from the continuance of the trespass; and while ordinarily there is no sympathy to be wasted on a trespasser, yet such multiplicity of suits should be avoided and especially under circumstances like those before us. The rocks could not be immediately removed. The court have observed that peculiarity of the case and shaped their judgment to give time. It may take a long time, and during the whole of it the defendant would be liable to daily actions.

For reasons of this character it has very often been held that while ordinarily courts of equity will not wield their power merely to redress a trespass, yet they will interfere under peculiar circumstances, and have often done so where the trespass was a continuing one, and a multiplicity of suits at law was involved in the legal remedy. The doctrine was recognized and the authorities cited in the Murdoch Case (*supra*), and the rule deemed perfectly settled.

That case, and those referred to, it is true, were cases of intrusion where no consent had been given for the entry of the intruder, but whether the trespass was such from the beginning, or became one after a revocation of the license, can make no difference as it respects the adequacy of the legal remedy. That is the same in either event. Two cases of the former character were cited in the Uline Case. Bowyer *v.* Cook, 4 M. G. & S. 236; Holmes *v.* Wilson, 10 A. & E. 503. In one, stumps and stakes had been left on plaintiff's land, and in the other buttresses to support a road; in each an action of trespass had been brought

and damages recovered and paid; and in each, after a new notice to remove the obstruction, a further action of trespass was brought and sustained. So that, as I have said, the legal remedy is identical, however the trespass originated.

It is a general rule that a court of equity will act in such cases only after the plaintiff's right has been established at law, but that rule has its exceptions. T. & B. R. R. Co. *v.* B. &. H. T. R. R. Co., 86 N. Y. 128. Where the facts are in doubt, and the right not clear, such undoubtedly would be a just basis of decision, though the modern system of trying equity cases makes the rule less important. Where, as in an intrusion by railroad companies whose occupation threatens to be continuous, the injury partakes of that character, an action at law to establish the right has not been required. Indeed, I am inclined to deem it more a rule of discretion than of jurisdiction.

In Avery *v.* New York Central and Hudson River Railroad Company, 106 N. Y. 142, to which we have been referred since the argument, we were disposed to sustain a mandatory injunction requiring defendant to remove so much of a fence as obstructed plaintiff's right of way, although the obstruction was not a nuisance, but an invasion of a private right. In that case the equitable remedy was not challenged by either counsel or the court, and evidently stood upon the grounds here invoked; those of a continuing trespass the remedy for which at law would be inadequate, and involve repeated actions by the injured party for damages daily occurring.

These views of the case enable us to support the judgment rendered. It should be affirmed, with costs.

All concur, except RUGER, Ch. J., not voting.

Judgment affirmed.

B. *Impracticability of Legal Remedy.*

AGNES BALES' CASE.

IN CHANCERY, *Circa* 1394.

[*Select Cases in Chancery, 10 Selden Society, No.* 73.] [1]

To the most reverend Father in God, and his most gracious Lord, the Bishop of Exeter, Chancellor of England,[2]

Most humbly beseecheth your poor oratrix Agnes, widow of Richard Bales, that whereas she of late purposed to have crossed the sea to the parts of Friesland to her said husband, who was then there, when he lived in the port of Chichester, at which place [Chichester] the said Agnes was prevented of her said passage, and all her goods there found,

[1] Early Chancery proceedings, Bundle 3, No. 71.

[2] Edmund de Stafford.

to the value of £40, as in a schedule made thereof and ready to be shown is more fully contained, were arrested because she had not then a writ of passage; and the same goods, so there arrested by Thomas Hyne and William Farnehirst of the same town, were sent by them to Sir Thomas Frie, Vicar of West Wittering, to be safely kept to the use of the said suppliant, as by evidential letters made under the seals of the said Thomas Hyne and William and other people of the said town more fully appeareth; And now the said Vicar hath carried away the said goods and will not deliver them to the said suppliant as right doth demand, but absenteth himself and departeth from place to place, so that she can have no recovery nor remedy against him at common law, nor otherwise unless she be recovered and secured by your gracious aid: May it please your most gracious Lordship to grant a writ to cause to come before you as well the said Thomas Hyne and William, who arrested the same goods, as the said Vicar, to whom they were delivered, to answer as to the goods and the misdeeds aforesaid; for God and in way of charity.

SIMON BRIT'S CASE.

In Chancery, 1397.

[*Select Cases in Chancery,* 10 *Selden Society, No.* 21.][1]

To the most honoured and most gracious Lord and Father in God, the Bishop of Exeter and Chancellor of England,[2]

Humbly beseecheth Simon Brit, of the County of Somerset, that whereas he was in peaceable possession of two parts [thirds] of the manor of Huish-Champflower and the advowson of the church of the same town in the said County until one Alice Colne brought an assize of *novel disseisin* against the said Simon; and, pending the assize, the said Alice entered upon the said manor by the maintenance and counsel of Sir Hugh Courtenay, knight, and afterwards Alice made feoffment of the said manor to Sir Hugh, and this pending the assize; to the great damage and impoverishment of the said Simon; and Simon dare not sue at common law against Sir Hugh: May it please you of your especial grace to grant a writ directed to the said Sir Hugh, commanding him to be before the Council of our Lord the King at a certain day and under a certain pain; for God and in way of charity; or otherwise the said Simon is impoverished and destroyed for ever.

Indorsed. At which day the within written Hugh appeared in the Chancery, and the said Simon Brit, although solemnly called, did not come; wherefore it was considered that the said Hugh should go quit of the Court.

[1] Early Chancery Proceedings, Bundle 3, No. 65.

[2] Edmund de Stafford.

USQE'S CASE.

In Chancery, 1397-1401.

[*Select Cases in Chancery,* 10 *Selden Society, No.* 31.] [1]

To the most honourable and most reverend Father in God, the Bishop of Exeter,[2] Chancellor of England,

Complaineth his poor chaplain, David Usqe, formerly Vicar of the church of Pawlett in the County of Somerset, that whereas one William Bawe, Parson of the church of Greinton in the said county, on the Friday before the feast of Pentecost in the 20th year of our Lord King Richard who now is [1397], with force and arms, and six other men unknown, his adherents, with him, fully arrayed in arms in warlike manner, came to the said church of Pawlett when the said David was vested for mass, before he had said the Gospel of S. John which is called *In principio;* and in the chancel of the said church he commanded the said David, who was at his altar, vested, to take off his vestments and to speak with them; the which David answered and said unto them that he would not take off his vestments until he knew their will; the which William Bawe and the others of his covin said expressly that they would cut off his head if he would not make fine with them for 100 marks; and for fear of this menace, the said David made fine and ransom with the said William and his company for £10 sterling in order to save his life. And after the said William and his company had ransomed the said David in manner aforesaid, the said William and his adherents made the said David swear on his priestly word to go with them out of his said church to the town of Bridgewater; and there they forced him to make a bond to them for £20, on condition to pay the said £10 on Friday then next following; And after the said David had made the said bond, the said William and his adherents compelled the said David to deliver unto them, in default of other payment, as the price of his said ransom, all his sheep, his lambs, his pigs, and his other goods, on the Saturday in the eve of Pentecost following next after the aforesaid Friday; on which day the said William and his company took the goods of the said David and delivered up to him his said bond. And the said sheep, lambs, and other goods, they brought to the house of the said William at Alverton, and they are still there in ward, to the great destruction and annihilation of the plaintiff's poor estate, and against all law and right: May it please your most gracious Lordship to grant the said David a writ *de quibusdam certis de causis,* to make the said William come before you at a certain day and under a certain pain contained in the writ, to make answer to this bill; for God and in way of charity. Having consideration that the said William is so rich and so

[1] Early Chancery Proceedings, Bundle 3, No. 41.

[2] Edmund de Stafford.

strong in friends in the country where he dwelleth, that the said David will never recover from him at common law, if he have not aid from your most gracious Lordship.[1]

A writ thereof was made [commanding] the said William Bawe to be before the King in his Chancery on the quindene of Martinmas next to come.

BRACEBRIDGE *v.* BRACEBRIDGE.

IN CHANCERY, 1582-3.

[*Choyce Cases in Chancery,* 159.][2]

It was moved by Master Sollicitor generall on the Defendant's behalf, that the issue joined between the parties in this Court, is only whether the lands claimed by the Plaintiff be parcell of her dower recovered at the Common Law or no, and therefore meetest to be tryed by the Common Law; But Master *Beaumont* being for the Plaintiff, alleaged, that albeit the Plaintiff hath recovered her dower at Law, yet the defendant being of great power in the Country, keeps her out contrary to the same recovery: Therefore an Injunction of this Court is awarded, and the matter by order to be retained.

CANNEL *v.* BUCKLE.

IN CHANCERY, BEFORE LORD CHANCELLOR MACCLESFIELD, 1724.

[2 *Peere Williams* 243.]

A Feme sole was seised in fee of land of about 10 l. *per annum,* and designing to marry, agreed with her intended husband, that she upon the marriage would convey her lands to the husband and his heirs; and for that purpose, previous to the marriage, she gave a bond of 200 l. penalty to the intended husband, in which the intended marriage was recited, and the condition was, that in case the marriage took effect, she would convey all her said lands to the husband and his heirs.

The marriage took effect, and there was issue of the marriage, and the wife made her will reciting her said bond, and devised all her land to her husband in fee and died.

The issue of the marriage died without issue; after which the husband enjoyed the land during his life, and on his death the heir of the husband brought a bill against the heir of the wife to compel him to convey the lands of the wife to the heir of the husband.

[1] The reason for applying to the Chancellor appears sufficiently from the last paragraph. No doctrine of equity seems to be involved. *Reporter's note.*

[2] From the reprint of Stevens and Haynes (1870) from the edition of 1672.

Obj. This bond given by the wife became void upon the intermarriage, because it was then suspended; and a personal action once suspended is extinct; besides, wherever no action lies at law to recover debt or damages, there no suit in equity lies to compel a specific performance, which specific performance is given in equity only in lieu of damages; and 1 *Chan. Cases* 21, (lady *Darcy's* case) was cited, proving that where a woman on a treaty of marriage agrees with a man, or a man with a woman, there the subsequent intermarriage determines the agreement.

Lord Chancellor: The impropriety of the security, *viz.* a bond from a woman to a man whom she intends to marry, or the inaccurate manner of wording such bond, is not material; for it is sufficient that the bond is a written evidence of the agreement of the parties, that the feme in consideration of marriage agrees the man shall have the land as her portion; and this agreement being upon a valuable consideration shall be executed in equity. It is unreasonable that the intermarriage, upon which alone the bond is to take effect, should itself be a destruction of the bond, and the foundation of that notion is that in law the husband and wife being one person, the husband cannot sue the wife on this agreement; whereas in equity it is constant experience, that the husband may sue the wife or the wife the husband, and the husband might sue the wife upon this very agreement in the principal case. Neither is it a true rule which had been laid down by the other side, that where an action cannot be brought at law on an agreement for damages, there a suit will not lie in equity for a specific performance, as is plain from this case; suppose a feme infant seised in fee, on a marriage with the consent of her guardians, should covenant in consideration of a settlement to convey her inheritance to her husband; if this were done in consideration of a competent settlement, equity would execute the agreement, tho' no action would lie at law to recover damages.

But in regard this bond was a very stale one (being given so long since as in 1678) and the husband had for so long a time omitted to sue upon it in equity, the court ordered a trial at law to see whether this bond was executed or not, and all other matters to be respited till after the trial.[1]

GETCHELL *v.* JEWETT (1826), 4 *Greenl.* 350, 360.—MELLEN, C. J.—As to the first point, the defendant's counsel contends that where a remedy cannot be had by an action at law to recover damages for a breach of the contract, the court will not compel a specific performance. In support of this position he cites 1 *Harrison's Ch. Pr.* 29. Such an action could not be maintained against *Jewett,* because his engagement was to reconvey, provided the plaintiff should make the before mentioned payments at the times appointed; and this he did not do. The

[1] See note on the question of enforcing contracts between husbands and wives, 19 Am. Dec. 230.

position in *Harrison* is not true in the broad sense in which it is laid down. *Newland,* in his treatise, page 109, says, "there are several "species of contracts which a court of equity will enforce, on which no "action could be maintained at law to recover damages;"—and he goes on to enumerate many of them. See also *Cannel v. Buckle* 2 *P. Wms.* 244. *Newland* 230. In the case of *Alley v. Deschamps,* 13 *Ves.* 224, which was a bill for specific performance, the Lord Chancellor in delivering his opinion says—"This relief, I have formerly observed, was "first given upon a legal right, instead of damages; which was followed "by another class of cases equally clear, that when a party was not able "to perform his engagement according to the letter of it, if the failure "was not substantial, the other should not be permitted to take ad-"vantage of the strict form." In *Lloyd v. Collet* 4 *Bro.* 469, in note to *Harrington v. Wheeler* 4 *Ves.* 690, the Lord Chancellor held a language more severe. His words are, "Plaintiff says, by my own default this "contract is void in law; I cannot succeed at law; on the contrary, the "other party is entitled to recover back the money he has paid in "expectation of the execution of the contract; therefore an equity arises "to me; an equity out of his own neglect! it is a singular head of "equity." Camparing this last case, which was decided many years before, with that of *Alley v. Deschamps,* we perceive an increasing disposition to extend equitable relief, where a failure in some unimportant particular has occurred, but no substantial inquiry been occasioned.

It is true that in *Gibson v. Patterson* 1 *Atk.* 12, Lord *Hardwicke* seems to have laid down the doctrine, that lapse of time was of no importance; and to have decreed in favor of a vendor, without any regard to his negligence in not procuring his title deeds, and notwithstanding a conveyance within the time limited for the purpose by the articles. But the accuracy of the report is denied; and in *Lloyd v. Collet* and several other cases, the generality of the principle laid down by Lord *Hardwicke* has been overruled, and a different one established; and it seems "now "the acknowledged rule in courts of equity, that where the party who "applies for a specific performance of a contract, has omitted to execute "his part of it for a considerable time after the day appointed for the "purpose, without being able to assign sufficient reasons to justify or "to excuse his delay, the court will not compel a specific performance "of the agreement, considering his conduct to be evidence of the aban-"donment of it." *Newland* 242. *Lloyd v. Collet* 4 *Ves.* 690. *Harrington v. Wheeler* 4 *Ves.* 686. *Marquis of Hertford v. Boore, Astor & Boore* 5 *Ves.* 719. *Spurrier v. Hancock* 4 *Ves.* 667, and other cases there cited. See also *Guest v. Homfray* 5 *Ves.* 818. *Payne v. Miller* 6 *Ves.* 349. *Smith v. Burnham* 2 *Anstr.* 527. *Seton v. Slade* 7 *Ves.* 265. *Vernon v. Stephens* 2 *P. Wms.* 66. *Brazier v. Grattz & al.* 6 *Wheat.* 528. In *Davis v. Hone* 2 *Sch. & Lef.* 347, the Lord Chancellor says, "a court "of equity frequently decrees performance, when the action at law has "been lost by the fault of the very party seeking the specific perform-

"ance; if it be, notwithstanding, conscientious that the agreement "should be performed; as in cases where the terms of the agreement "have not been strictly performed on the part of the person seeking "specific performance, and to sustain an action at law, performance "must be averred according to the very terms of the contract." And in *Lennox v. Napper ib.* 684, the Chancellor says, that the courts, in all cases of contracts for estates in land, have been in the habit of relieving, where the party, from his own neglect, had suffered a lapse of time; and from that circumstance, or others, could not maintain an action to recover at law. Courts of equity have, therefore, enforced contracts specifically where no action for damages could be maintained; and in various cases of such contracts they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus in the case of an estate sold at auction, there is a condition to forfeit a deposit, if the purchase be not completed within a certain time; yet the court is in the constant habit of relieving against the lapse of time; and so in cases of mortgage; and in many instances relief is given against mere lapse of time where that is not essential to the substance of the contract.

LENNON *v.* NAPPER (1802), 2 *Sch. & Lef.* 682, 684.—LORD REDESDALE. The application to the court in such cases is to compel a specific performance of a covenant to make an estate of land: This is a good ground for application to a court of equity, upon which it daily exercises jurisdiction; and specific performance ought to be decreed, unless there are particular circumstances which ought to exclude the party from relief. The courts in all cases of contracts for estates in land, have been in the habit of relieving, where the party from his own neglect had suffered a lapse of time, and from that, or other circumstances, could not maintain an action to recover damages at law: and even where nothing exists to prevent his suing at law, so many things are necessary to enable him to recover at law, that the formalities alone render it very inconvenient and hazardous so to proceed: nor could, in many cases, the legal remedy be adequate to the demands of justice. Courts of equity have, therefore, enforced contracts specifically, where no action for damages could be maintained; for, at law, the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases was sufficient to require the interference of courts of equity. They dispense with that which would make compliance with what the law requires oppressive: and in various cases of such contracts, they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus in the case of an estate sold by auction, there is a condition to forfeit the deposit, if the purchase be not completed within a certain time; yet the court is in the constant habit of relieving against the lapse of time: and so in the case of mortgages, and, in many instances, relief is given against mere lapse of time, where lapse of time is not essential to the substance of the contract.

HAMILTON *v.* CUMMINGS.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1815.

[1 *Johnson's Chancery* 517.] [1]

THE CHANCELLOR [KENT]. Upon the answer and proofs in this cause, the relief sought and claimed is, that the two bonds acknowledged to be held by the defendant, should be decreed to be delivered up and cancelled. The question, whether such a remedy can, or ought to be applied, leads to an interesting inquiry.

I. The Defendant admits that he holds a bond, executed by the ancestor of the plaintiff, on the 22d of *September,* 1788, for the payment of 996 *l.* on the first of *January* following; and that it was given upon a special trust, of a secret and delicate nature, which he does not think proper to disclose; and that it was to be in force only upon certain contingencies which have not yet happened, and, probably, never will; and that he paid no money or other consideration for it, and has no personal interest in it, nor has ever pretended to put it in suit. After such a confession, it would be very unreasonable that the bond should be suffered to continue a dead weight upon the property that may have descended to the plaintiff. It is, however, not easy to extract from the books any precise rule by which the jurisdiction of the court is, in such cases, to be exercised. The bond, most probably, could not be enforced at law, though it appears on the face of it to be an absolute bond for the payment of money. The lapse of 27 years, if not most satisfactorily accounted for, would form of itself a conclusive bar to a recovery; and the admission in the answer must destroy its validity here, even if they cannot be received as a defence at law. Why, then, should it any longer exist to cast even a shade over the title to the assets of the ancestor?

I have looked into the cases on the point of jurisdiction, and I have no doubt that the court has competent power to order the bond to be cancelled; and the power is the more necessary since there is no such jurisdiction at law.

In *Minshaw* v. *Jordan,* (3 *Bro.* 18. n.,) a bill was filed to have a promissory note delivered up and cancelled, as obtained by fraud, and without consideration. The *Master of the Rolls* retained the bill, and allowed the defendant to proceed at law upon the note; and the verdict being found against it, he then decreed that the note be delivered up to the plaintiff to be cancelled. But, afterwards, in *Ryan* v. *Macmath,* (3 *Bro.* 15,) Lord *Thurlow* would not direct a note to be delivered up, though a recovery had been unsuccessfully attempted at law; and he would not admit the rule in this general extent, that whenever one party

[1] A statement of facts has been omitted.

had an instrument on which he could not maintain an action at law, he must be decreed to give it up, and he accordingly dismissed the bill, but without costs. Sir *Samuel Romilly,* in citing this case, in 13 *Ves.* 584, observed, that the decision was disapproved of, at the time, as the note was void, not upon the face of it, but from collateral circumstances; and in *Newman* v. *Milner,* (2 *Ves.* jun. 483,) notwithstanding this case of *Ryan* v. *Mackmoth* was mentioned, Lord *Loughborough* ordered a bill of exchange, avowedly given by one partner in the name of the firm, for his private debt, to be delivered up, with costs, without even waiting to have its validity tried at law; and he did it on the ground, that the evidence was clear and decisive against the bill, and that the payee took it, knowing it to be for a private debt, and that there was no need of a verdict to satisfy the conscience of the court. But the subsequent cases of *Franco* v. *Bolton,* (3 *Ves.* 368,) and of *Gray* v. *Mathias,* (5 *Ves.* 286,) are calculated to throw doubt once more on the exercise of this power. In the first of those cases, a bond was alleged to have been given for an illegal consideration, and the obligee had obtained a verdict at law. The bill was to have the bond delivered up; but it was, on demurrer, dismissed by Lord *Loughborough,* on the ground, that there was no necessity for the interposition of the court, as the matter could have been pleaded, and the bond rendered null, at law. In the other case, the bond was void on its face, as appearing to have been given *pro turpi causa,* but the *court of exchequer* refused a decree to deliver it up, and principally on the ground of the length and expense of such a remedy in equity, when the defence at law was irrefragable. The *Ch. Baron* observed, with some sensibility, that though equity might have a concurrent jurisdiction, it was not fitting, in that particular case, to exercise it, as the plaintiff had a full defence at law; and it was oppressive to seek, by a long and costly litigation in chancery, to have the bond delivered up, when, by the plaintiff's own showing, it was a mere nullity. In that case, the bond had never been sued at law, and the bill was dismissed, with costs.

The equity power was afterwards asserted by Lord *Eldon,* in *Bromley* v. *Holland,* (7 *Ves.* 3,) and he dwelt much on the question of jurisdiction, and did not concur in the decision in *Franco* v. *Bolton.* He seemed to think the question had become settled, by a serious of decisions, in favour of the authority of the court to direct instruments to be delivered up, though they might be void at law. He admitted there was some degree of contradiction in the cases, but he inclined in favour of the jurisdiction, even if the question had been *res integra;* and though he could not say, if it was clear that no use could be made of the instrument, that was ground enough for the equitable jurisdiction, yet "it was not unwholesome that an instrument should be delivered up upon which a demand may be vexatiously made as often as the purpose of vexation may urge the party to make it." In *Jackman* v. *Mitchell,* (13 *Ves.* 581,) the equity jurisdiction was again freely exercised. The bond there

was given to secure one creditor the deficiency of a composition, and was never communicated to the other creditors, and had never been put in suit. The bill charged the bond to have been thus taken against the policy of the law, and in fraud of creditors; and the counsel for the defendant, when speaking of the jurisdiction, observed, that if an instrument was void upon its face, the court would not assume jurisdiction and cancel it, because it was void at law; and that "there was no instance of a decree for delivering up a bond, appearing upon the face of it to be void." Lord *Eldon* expressly waived any opinion on that distinction as to jurisdiction, but said that the bond was bad, because it was proved, *aliunde,* that it was intended to be kept secret; and he accordingly decreed, that it be delivered up, and awarded costs against the defendant.

I am inclined to think, that the weight of authority, and the reason of the thing, are equally in favour of the jurisdiction of the court, whether the instrument is, or is not, void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause, and that these assumed distinctions are not well founded. It is every day's practice, as the counsel observed, in *French* v. *Connelly,* (2 *Anst.* 454,) to order instruments to be delivered up, of which a bad use might be attempted to be made at law, *although they could not even there entitle the holders to recover.* It is, indeed, not very apparent, why a doubt could have been started in some of these modern cases as to the general jurisdiction of the court, when we consider the uniform tenor and language of the more ancient decisions, and which do not appear to have turned upon the distinction whether the instruments were, or were not, void at law. In *Whittingham* v. *Thornburgh,* (2 *Vern.* 206,) and *Goddart* v. *Garrett,* (*ibid.* 269,) and *De Costa* v. *Scandrel,* (2 *P. Wms.* 170,) policies of insurance, procured by fraud, were ordered to be delivered up and cancelled, though the fraud was equally a defence at law. And in another case, (*Law* v. *Law, Cases temp. Talbot,* 140. 3 *P. Wms.* 391,) Lord *Talbot* ordered a bond to be cancelled, and charged the defendant with costs, without deciding whether, or not, it was good at law. But, while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence not arising on its face, may be difficult, or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation. If, however, the defect appears on the bond itself, the interference

of this court will still depend on a question of expediency, and not on a question of jurisdiction. It may, sometimes, become essential to the perfect and tranquil enjoyment of private right, that this most important branch of equity power should be exercised in the one case as well as in the other; and it may be here observed, that in the case of *Law* v. *Law,* the whole consideration was spread out upon the bond, and that, as the case is reported in *Peere Williams,* the Lord Ch. was inclined to consider the bond as void at law as well as in equity, and yet he cancelled the bond without sending the parties to law. The learned counsel, therefore, in *Jackman* v. *Mitchell,* appear to me to have hazarded too much in their assertion that there was no such case to be found.

The bond now in question comes within that case, for it is good on its face, and void only from the facts disclosed by the defendant's answer. We can, consistently with the whole current authority, direct it to be cancelled. It is the more proper to do so, because it is, at least, doubtful, whether the pretended secret trust, under which it was taken, and the failure of that trust, would be received as a defence at law. My impression is, that it could not. But, in this court, the evidence furnished by the answer is decisive. The defendant holds a bond for 27 years, and says it was given upon a trust which he ought not to disclose, and depends upon a contingency which has never happened, and which he says is only within the reach of possibility. Such a bond cannot be permitted to endure for ever, and we cannot recognize any trust which is not disclosed, and is, therefore, unknown. It is not convenient, or just, that such a bond should continue, with a pretension to the assets in the hands of the plaintiff. It might embarrass their application, or weaken their security, or poison their enjoyment. It is immoral for a person to retain a bond which is useless to him, and an annoyance to others.

This bond must, therefore, be delivered up, and cancelled.

2. The other bond, conditioned for the payment of 60 pounds, and on which a suit is pending at law, is shown, by the proof, to be no longer valid. It bears date on the 27th day of *September,* 1794, and is made payable on the 29th of the same month; and the answer of the defendant avers that it was given for a debt justly due on a settlement of accounts; and denies that it was given to indemnify the defendant for becoming bail in any suit whatever; and that the defendant was never bail in any suit for the obligor. The answer further states, that one of the witnesses to the bond is dead, and that *William Hill,* the other witness, is living, and is a man of good repute. This cause was put at issue, and witnesses examined on each side, and publication passed by consent. In the course of examination, the plaintiff proves, by this same witness, that he was present at the execution of the bond; and that he, with the other witness, (now dead,) at the same time, attested a receipt given by the defendant to the obligor, showing that the bond was given by way of indemnity to the defendant for becoming bail for the obligor. The receipt is made

an exhibit in the cause, and proved by his witness; and it is of the same date with the bond, and declares that the bond, which it duly specifies, was given as an indemnity to the defendant for being surety for the obligor, in a suit brought against him by one *Samuel Wood;* and that if the suit was settled and discharged in due time, without any further damage, the bond was to be void. No damage is pretended to have been sustained. The defendant denies that he ever was bail for the obligor. As the receipt goes to contradict the express terms of the bond, and is not under seal, I apprehend it would not be admitted, at law, as a defence against the payment of the bond; and as it forms a matter of defence *dehors* the bond, and is good in equity, it brings the case within the reach of all the decisions in favour of the exercise of the jurisdiction of this court; and it becomes essential to justice that the court should interfere and protect the plaintiff from the claim set up at law.

I have not deemed it regular to take notice of the suggestion of the counsel for the defendant, accompanying his brief, (for the case was, by mutual arrangement and consent, argued on paper,) of a defect in the interrogatories on the part of the plaintiff, and of the delay of his solicitor to produce the exhibit. There is no motion before me on the subject, nor would it have been in season if it had been made; for even before the last term, publication passed by a rule entered by consent, and the cause was, by the like consent, set down for hearing at the last term. I shall, accordingly, decree, that both the bonds be delivered up to the register, or assistant register, and cancelled within 20 days after notice of this decree; and that the defendant be perpetually enjoined from prosecuting either of the said bonds at law; and that the defendant pay the costs which have accrued in the suit at law, and, also, the costs of this suit.

Decree accordingly.

ANDREWS *v.* FRIERSON (1902), 134 Ala. 626, 630.—HARALSON, J. The prayer of the bill is for a rescission and cancellation of complainant's said contract with Frierson; for an injunction against the prosecution of said suits at law; for an ascertainment of the amount that ought to be paid by complainant to said Frierson for his services in making said sale, and a decree directing how the same shall be paid, and for general relief. The chancellor, on the motion of defendants, dismissed the bill and dissolved the temporary injunction, on the ground that complainant had a complete and adequate remedy at law, and that there was no equity in the bill.

Frierson, as stated, has not sued complainant, and if complainant could successfully defend at law the suit brought against him in the circuit court by Gann, and the garnishment against him in the suit of Gann v. Frierson in that court, it is evident that in neither of these

suits could he obtain a judgment which would be a complete defense to a suit which may hereafter be brought by Frierson against him arising out of his said contract with the latter. Relief against said suits arising out of, but not based directly, on said contract, is incidental to the relief here sought, which is for the rescission and cancellation of said contract. It is evident that the powers of a court of law are not adequate for the purposes sought.

As to the power of a court of equity to rescind and cancel written instruments, procured to be made by fraud, it is well settled that its jurisdiction may be fully exercised. The decisions of courts so holding, says Story, "are founded on the true principles of equity jurisprudence, which is not merely remedial but also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for sinister purposes." The rule applies to deeds, negotiable instruments or mere written agreements or contracts, solemn or otherwise. As to an instrument of the latter character, the same author observes, "While it exists, it is always liable to be applied to improper purposes, and it may be vexatiously litigated at a distance of time when the proper evidence to repel the claim may have been lost or obscured, or when the other party may be disabled from contesting its validity with as much ability and force as he can contest it at the present moment."—Story Eq. Juris., §700; 1 Pom. Eq. J., 221; *Merritt v. Ehrman,* 116 Ala. 278; *Pinkston v. Boykin,* 130 Ala. 483.

In this suit with all the parties before it, the court may proceed to settle all their troubles, give each party his rights and quiet apprehension and liability to further litigation arising out of said contract.

The court erred in the decree rendered, and it will be reversed and the cause remanded.

Reversed and remanded.

NEWTON *v.* SWAZEY.

IN THE SUPREME COURT OF JUDICATURE OF NEW HAMPSHIRE, 1835.

[8 *New Hampshire* 1.]

IN CHANCERY. The plaintiff entered into an agreement with Swazey and Gookin by the terms of which they were to deed to the plaintiff a certain tract of land, of which they were tenants in common, when the plaintiff should have paid certain notes which he gave for the purchase price. The plaintiff went into possession and paid the notes as they became due. It further appeared that, through a mistake, the agreement had never been executed by Gookin. Gookin died intestate before the time for payment of the last notes. The plaintiff now offers to pay the balance due, providing he can receive a good title to the property. He alleges that he has at various times since the death of Gookin applied

to Swazey and the heirs of Gookin, and the guardians of those who were minors, and has requested them to make him a good warranty deed on his paying the full amount.

The bill then prayed a decree that the defendants should convey the land to the plaintiff, on the payment of the balance due.[1]

PARKER, J. * * * The defendants, by their neglect to put in an answer, in compliance with the rule, admit all the allegations in the bill; and it is understood they have no objections to a decree such as is prayed, if the heirs of said Gookin may lawfully be directed to join with the defendant, Swazey, in the execution of the conveyance.

It is admitted, then, that Gookin and Swazey, being seized of the land as tenants in common, bargained and sold the same to the plaintiff, and agreed to execute a writing obligatory, that upon certain conditions they would deliver him a warrantee deed;—that the bond was drawn, and was executed by Swazey, but by mistake and accident was never executed by Gookin.

Had this obligation been executed by both the defendants, there could not have been any objection on account of the form of the instrument. An agreement to convey may be enforced, notwithstanding it is secured by a penalty, and may be contained in the condition of a bond. 2 *Atkyns* 371, *Howard* vs. *Hopkyns; Sugden* vs. *Vendors,* 163; 1 *Maddock's Ch.* 374, *note* 2; 2 *Vesey Sen.* 528, *Chilliner* vs. *Chilliner;* 1 *P. Wms.* 191, *Hobson* vs. *Trevor.* Courts of equity look not to the form but the substance, and the bill sets forth, substantially, an agreement to convey, upon the payment of certain notes, and that an obligation was drawn containing a condition for securing the performance of that agreement, and executed by Swazey.

But had Gookin lived, no bill could have been maintained against him on account of the bond, because it was not executed by him; and as Swazey could not perform the entire agreement there stated, having title to but part of the land, there would be no propriety in entering a decree against him alone.

The bond, however, merely contained the stipulation upon which the parties had before agreed. The bill states that Gookin and Swazey sold the land to the plaintiff, and that he gave his notes; and the bond was intended to be a security for a conveyance to him upon the payment of the notes.

The question then is, whether this sale by parol can be enforced, or whether the plaintiff is barred from the relief he seeks, by the provisions of the statute, that all leases, estates, interests of freehold, &c., made and

[1] This statement of the case is substituted for that of the Reporter.

The fine quality of Judge Parker's mind is seen to advantage in the case of Britton *v.* Turner (1834) 6 N. H. 481, in which *indebitatus assumpsit* was forced to do a great and it is to be hoped an abiding equity.

It is of interest to note that the learned judge was for many years until his death professor in the Harvard Law School.

created by parol, and not in writing, shall have the force and effect of leases at will only, and shall not, either in law or equity, be deemed or taken to have any greater force; and that no action shall be maintained upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum thereof, be in writing, and signed by the parties to be charged therewith, or signed by some other person thereunto, lawfully authorized by writing.

There are two grounds upon which a decree for a specific performance may be made in this case, notwithstanding these provisions of the statute.

The statute was intended to guard against fraud and perjury, and the proof of agreements of this character by evidence very liable to mistake or misapprehension. If, therefore, there is no dispute about the agreement, the case is not within the reason of the statute; and it is settled that when the agreement is distinctly set forth in the bill, and confessed by the answer, a court of equity will decree a specific performance, notwithstanding the agreement was not reduced to writing, unless the party insists upon the benefit of the statute. 1 *Madd. Ch.* 383; 1 *Ves. Sen.* 220, *Attorney General* vs. *Day;* 6 *Ves.* 37, *Cooth* vs. *Jackson;* 4 *Ves.* 23, *Moore* vs. *Edwards;* 12 *Ves.* 471, *Bragden* vs. *Bradbear;* 15 *Ves.* 375, *Rowe* vs. *Teed.*

In this case the argument is confessed, not by the answer, but by the neglect to comply with the rule to put in an answer; and there is no uncertainty about the terms of the agreement. They are alleged in the bill, and were in fact reduced to writing at the time, so that there has been no ground for any misunderstanding about them,—and the defendants do not set up the statute in bar.

Again—the agreement is not only admitted, but there has been a part performance of the contract, which is held in equity not to overrule the statute, but to take the case out of it. 1 *Madd. Ch.* 376; 1 *Vern.* 160, *note; ditto,* 363, *Butcher* vs. *Stapely & Butcher;* 2 *Vern.* 455, *Pyke* vs. *Williams;* 3 *Ves.* 381, *Wills* vs. *Stradling; ditto* 38, *note a;* 18 *Ves.* 328, *Gregory* vs. *Mighill;* 1 *Swanston* 181, *Morphett* vs. *Jones;* 14 *Johns. Rep.* 15, *Parkhurst* vs. *Van Cortland.*

Where, however, there is an uncertainty as to the terms of the agreement, a specific performance cannot be decreed, but other relief is sometimes granted. 1 *Madd.* 379; 2 *Eq. Cas. Abr.* 46, *Lord Pengall* and *Ross;* 1 *Johns. Ch. R.* 146, *Phillips* vs. *Thompson;* 14 *Johns.* 37, 41, *S. C. in error.*

Here has been not only a payment of part of the purchase money, but the plaintiff has been let into possession, and has proceeded to make valuable improvements; and this it is well settled constitutes a part performance within the rule. 1 *Madd.* 380. Whether the mere payment of part of the purchase money would have been sufficient, seems not so clearly settled.

Under the existing circumstances, it would be a great hardship upon the plaintiff if he could not have the contract specifically performed; and the only obstacle to this, in point of fact, has probably arisen from the decease of Gookin. But this forms no objection in law to the maintainance of a bill for specific performance, in a case where such performance might have been enforced had the party lived. The death of either of the parties to the contract does not impair its obligation. Where there is an effectual agreement for the sale of an estate, by one then entitled, the heir of the vendor is bound to perform it, and the personal representative may enforce it against the vendee. 1 *Madd. Ch.* 368; 2 *Vern.* 215, *Baden* vs. *Countess of Pembroke;* 3 *Atkyns* 1, *Lacon* vs. *Mertins.*

We are of opinion, therefore, that the complainant is entitled to the relief sought by the bill.

HORD *v.* BAUGH.

IN THE SUPREME COURT OF TENNESSEE, 1847.

[7 *Humphreys* 576.][1]

Bill by Hord against the heirs of Josiah Baugh, showing that said Baugh, being the owner of a tract of land, conveyed it to Thomas F. Fowlkes, who conveyed to plaintiff; that the deed to Fowlkes was lost before recording; that complainant was in possession at the filing of the bill. The bill prayed for general relief, and also that the said deed be set up, and that the title to the land be divested out of the heirs of Baugh, etc. Defendant admitted all the charges of the bill, and submitted to such decree as the court should think proper. Bill dismissed. Complainant appealed.

TURLEY, J. delivered the opinion of the court.

This bill, filed by complainant, asking the aid of a Court of Chancery to set up a deed of bargain and sale for a tract of land, which was lost and destroyed before registration, the bargainor having departed this life without executing another.

The representatives of the bargainor do not resist the relief sought, but the Chancellor dismissed the bill, upon the ground that the bargainor having once conveyed the land, had parted with all his interest therein, and that the Court had no jurisdiction of such case.

In this we think the Chancellor erred. The loss of the deed is a casualty seriously endangering the complainant's title, as he can maintain no action of ejectment without it. He then certainly must have a right to ask the aid of a Court of Chancery in his case, either by having the legal title vested in him as against the bargainor and his representatives, or by having the deed set up and established as in all other cases of lost deeds. The complainant may have his decree for either or both of these remedies.

[1] This statement of the case is taken from the report of the case in 46 Am. Dec. 91.

SECTION 3. DISCOVERY AS A SOURCE OF EQUITY JURISDICTION.

REYNOLDS *v.* BURGESS SULPHITE CO.

IN THE SUPREME COURT OF NEW HAMPSHIRE, 1902.

[71 *New Hampshire* 332.]

See case as printed on p. 45 supra.

SECTION 4. JURISDICTION OVER PART IS JURISDICTION OVER THE WHOLE.

PARKER *v.* DEE.

IN CHANCERY, BEFORE LORD KEEPER FINCH, 1674.

[2 *Cases in Chancery* 200.]

Charles Everard, a banker, owed the plaintiff 700 *l.* and was also indebted to divers other persons by book-debts, &c. without seal, and by several judgments to others, and to B. by recognizance in chancery to perform the order of the court, and that being for money there was a judgment thereon, so the recognizance and judgment was for the same debt in effect, the defendant being executor of Everard. Trin. the plaintiff sued the defendant in *communi banco* for his debt. The defendant pleaded all the judgments which were on penal bonds, and pleaded also the said recognizance *ultra quod, &c.* he had no assets; the plaintiff sued her April, 1668, to discover the truth of the plea, and debts therein set forth and the assets.

Thereupon the defendant obtained an order that the plaintiff should make election whether he would proceed in this court or at law. The plaintiff elected to proceed here. The defendant used very many delays by petition and contempts to put off the hearing in this court, and paid divers of the debts which were of the same nature with the plaintiff's debts, without specialty, pending the suit in this court. The cause being heard, it was decreed to go to an account, wherein the executor was to be allowed all just debts due by record or specialty, and all debts without specialty, which were paid before the plaintiff's bill to be allowed; but not such as were paid voluntarily, pending the suit, or whereon voluntary confessed judgment were for debts without specialty.

The defendant got the Master of the Rolls, who heard the cause, to rehear it, and used other delays, and at last appealed to the late Lord Chancellor, who made a decree therein; and not content therewith, appealed to the new Lord Keeper. A case had been stated, and the

cause being now heard by the Lord Keeper, the defendant pressed for dismission, because the plaintiff had the effect of his suit to make a discovery, and it was his ignorance to choose to be dismissed before such time as he had examined his witnesses.

Lord Keeper, &c. There have been six hearings in this case, three on interlocutory orders, and three on the merits; as for the dismission to law, because the plaintiff hath discovery here; when this court can determine the matter that shall not be an hand-maid to other courts, nor beget a suit to be ended elsewhere; the defendant hath used great shifting, and showed great partiality; his plea at law was false and deceitful, for it appears he compounded debts at smaller value, and pleaded the whole debt as due; he compounded a debt of 300 *l.* for a jewel 200 *l.* value, and in truth but worth 100 *l.* and paid debts of the same nature as the plaintiff's, pending this suit, without compulsion by suit, which he ought not to have done; for after the suit begun the executor may not excuse himself by any voluntary payments; he may use legal delays, as imparlance and essoins, &c. to prefer one creditor before another, but he may not do it by false pleading of what lieth in his own knowledge; otherwise, if the falsity lie not in his knowledge, as *non est factum testatoris,* in this case the plea was false and fradulent, and therefore the plaintiff here shall have the same advantage as if the same plea were found false by verdict at law, and shall have all the same consequences here as follow on a false plea at law to all intents. And all judgments voluntarily confessed after his false plea go for nothing, and decreed accordingly, account of assets with their directions; but copyhold are no assets, and the lands devised or conveyed to pay debts must be in proportion equally of debts by bond or otherwise.[1]

[1] Spence speaks of this as "a very special case." 1 Jurisdiction of the Court of Chancery 679, n. (b).

As to this jurisdiction he says: "In the time of Elizabeth, as will be noticed hereafter, the court was in the habit of retaining jurisdiction of legal questions where it was only necessary to resort to the court for Discovery."—Id. 678.

"And when this court can determine the matter, it shall not be an handmaid to the other courts, nor beget a suit to be ended elsewhere. And therefore where a trial at law was pressed for, whether there was a new publication or not, it was said, the cause must properly end here; and where the court has a jurisdiction as to the end, it must have it likewise as to the means. And if the court is fully satisfied as to the evidence, they will not send it to a trial at law at all."—1 Fonblanque Equity Bk. 6, ch. 3, § 6 (text).

"It is true that if certain facts, essential to the merits of a claim purely legal, be exclusively within the knowledge of the party against whom that claim is asserted, he may be required in a Court of Chancery to disclose those facts, and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy."—*Per Marshall, C. J.*, in *Russell* v. *Clark's Ex'rs* (1812) 7 Cranch 69, 89.

"It is a settled rule, that when the Court of Chancery has gained jurisdiction of a cause for one purpose, it may retain it generally."—Per Spence, J., in Rathbone *v.* Warren (1813) 10 Johns. 587, 596.

JESUS COLLEGE *v.* BLOOME.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1745.

[3 *Atkyns* 262.]

The bill was brought to have an account and satisfaction for waste, in cutting down trees, against the defendant, an assignee of the lessee of the college, after an assignment of term, and for the waste done before assignment.

Lord Chancellor. Upon the opening of the case, the bill seems improper, and an action of trover is the remedy. Where the bill is for an injunction, and waste has been already committed, the court, to prevent a double suit, will decree an account, and satisfaction for what is past. So, upon bills for discovery of assets, the court will decree an account, which the party is entitled to here, and is incident to the other relief.

Let precedents be searched, for if there are any I will follow them; but if none, I will not make one: his lordship adjourned it to the first day of causes after term; and upon that day, Mr. Hoskins cited for the plaintiffs, 1 *P. Wms.* 406. Bishop of Winchester *versus* Knight, and 2 *P. Wms.* 240. Whitfield *versus* Bewit.

Lord Chancellor. The first question is, Whether bills ought to be entertained merely for satisfaction for timber cut down, after the estate of the tenant that cut it down is determined, by assignment or otherwise, without praying an injunction. I am of opinion they ought not. Waste is *a tort,* and the remedy lies at law.

In an action of waste, the place wasted is recovered; in an action of trover, *damages.*

The ground of coming into this court is, to stay the waste, and not by way of satisfaction for the damages, but by way of prevention of the wrong, which courts of law cannot do in those instances where a prohibition of waste will not strictly lie.

But in all these cases this court has gone further, merely upon the maxim of preventing multiplicity of suits, which is the reason that determines this court in many cases.

As in bills for account of assets, *&c.* that originally was only a bill for discovery, which cannot be had without an account, and therefore the court will make a complete decree and give the party his debt likewise.

So, in bills for *injunctions,* the court will make a complete decree, and give the party a satisfaction, and not oblige him to bring an action at law, as well as a bill here.

But nothing would tend to greater vexation than to admit of such bills as the present, after the term is at an end; and I am glad to find there is no precedent.

It does not appear in the case cited out of 2 *P. Wms.* that no injunction was prayed, I believe there was, and if so, it is the common case.

It is besides, different from the present, because the plaintiff there was only intitled to a moiety of the mines, and of the timber; which was the principal matter, and therefore an account was necessary.

The other case was the case of a mine, which is a sort of trade, and an account was therefore necessary; and there are many cases, where this court have made decrees in the cases of mines, which they could not have done in cases of timber.

Therefore the present case is reduced to this, that it is a bill brought by the college to have an account (after the determination of the tenant's estate, he having assigned) of a little timber cut down, without praying an injunction; and I think it is such a bill as the court ought not to entertain.

The next question is, as to costs; and I am of opinion, as the plaintiff is not barred of his remedy at law, he ought to pay costs: besides, what the bill is brought for, is of so small value, as to be beneath the dignity of the court.

Another reason is, that this suit might have been brought in the court of Grand Sessions in Wales, which has been often held, and this is a strong reason for discouraging bills here: therefore let the bill be dismissed with costs, but without prejudice to any remedy the plaintiff may have at law.[1]

LYNCH *v.* SUMRALL.

IN THE COURT OF APPEALS OF KENTUCKY, 1819.

[1 *A. K. Marshall* 468.]

The Chief Justice [BOYLE] delivered the opinion of the court.

This was a bill in chancery, filed by Lynch against Sumrall, in which he alleges that Sumrall agreed to deliver to him, on a certain day, at Louisville, two thousand dollars worth of pork, at eleven dollars per barrel, for which he was to pay Sumrall in bills of exchange drawn in his favor by A. Burr, on G. M. Ogden, of New York; that he delivered the bills to Sumrall, and that Sumrall has failed to comply with his contract by delivering the pork on the day agreed on, or at any other time; but that, for want of the requisite proof, he cannot maintain a suit at law, and therefore prays for a discovery and for relief. Sumrall answered and demurred. In his answer he admits, in substance, the con-

[1] "It is like many cases in this court, where though the party has a double remedy, he shall not be put to that expense; as for instance, in a bill brought for discovery of assets, after they are discovered, the plaintiff shall not be turned over to a suit of law, but shall be decreed satisfaction for his debt here."—*Per Lord Hardwicke* in *Yates* v. *Hambly* (1742) 2 Atk. 360, 363.

tract as alleged in the bill, and that he failed to comply with it; but the circuit court, on the demurrer, adjudging the case not proper for relief in a court of equity, dismissed the bill.

There can be no doubt that the law would afford to Lynch an adequate remedy for a breach of the contract on the part of Sumrall, and that if a court of equity can entertain jurisdiction for the purpose of giving relief, it must be in consequence of the discovery that is sought. It is certain that a court of equity will give relief in some cases, on the ground of a discovery being sought where it would not otherwise entertain jurisdiction, but it is equally certain that it will not do so in every case. The true distinction upon this subject seems to be between those cases in which the intervention of a jury is not, and those in which it is, necessary to ascertain the quantum of relief to which the complainant may be entitled. In the former class of cases a court of equity will give relief, because it can do so by its own proper means, without resorting to foreign aid; but in the latter it will not give relief, not having the power to do so without the aid of a jury, which is a common law tribunal. The intervention of a jury is, we apprehend, indispensably necessary to ascertain the quantum of damages which may have accrued by a breach of the contract in the present case; and if so, it must be of that description of cases of which a court of equity, though it will lend its assistance to the remedy sought at law, by coercing a discovery, will not entertain jurisdiction for the purpose of giving relief.

The decree, therefore, of the circuit court, dismissing the bill is correct, and must be affirmed, with costs.[1]

PEARCE *v.* CRESWICK (1843), 2 *Hare* 286, 293.—VICE-CHANCELLOR WIGRAM. * * * The first proposition relied upon by the Plaintiff, in support of the equity of his bill, was this,—that the case was one in which the right to discovery would carry with it the right to relief. And, undoubtedly, dicta are to be met with tending directly to the con-

[1] "With respect to the jurisdiction of the Court, this is clearly a bill of discovery, to ascertain what advances had been made to the other daughters by the father, either in his life time, or by his last will and testament: and, that discovery being made, the only remaining question is whether the complainant was bound to dismiss his bill, and seek redress by a new suit, in a Court of Law? Mr. Wickham cited some English authorities that seem to favor the doctrine; but I believe the uniform practice in this country has been otherwise; especially where the subject matter is within the cognisance of a Court of Equity, and there be no latent facts, to be inquired of by a Jury, necessary to be found, in order to enable the court to give a correct decision. And, even in such a case, the general practice is, for the Court of Chancery to direct an issue to try any particular uncertain fact that may be thought material in the cause."—*Per Fleming, J.* in *Chichester's Ex'x* v. *Vass's Admr.* (1810) 1 *Munf.* 98, 117.

clusion, that the right to discovery may entitle a Plaintiff to relief also. In *Adley* v. *The Whitstable Company,* Lord *Eldon* says,—"There is no mode of ascertaining what is due, except an account in a court of equity; but it is said the party may have discovery, and then go to law. The answer to that is, that the right to the discovery carries along with it the right to relief in equity." In *Ryle* v. *Haggie,* Sir *Thomas Plumer* said,—"When it is admitted that a party comes here properly for the discovery, the Court is never disposed to occasion a multiplicity of suits, by making him go to a court of law for the relief." And, in *M'Kenzie* v. *Johnston,* Sir *J. Leach* says,—"The Plaintiff can only learn from this discovery of the Defendants how they have acted in the execution of their agency; and it would be most unreasonable that he should pay them for that discovery, if it turned out that they had abused his confidence; yet such must be the case, if a bill for relief will not lie."

Now, in a case in which I think that justice requires the Court, if possible, to find an equity in this bill, to enable it, once for all, to decide the question between the parties, I should reluctantly deprive the Plaintiff of any equity to which the dicta I have referred to may entitle him. But I confess that the argument founded upon these dicta appears to me to be exposed to the objection of proving far too much. They can only be reconciled with the ordinary practice of the Court, by understanding them as having been uttered with reference, in each case, to the subject-matter to which they were applied, and not as laying down any abstract proposition so wide as the Plaintiff's argument requires. I think this part of the Plaintiff's case cannot be stated more highly in his favour than this,—that the necessity a party may be under (from the very nature of a given transaction) to come into equity for discovery, is a circumstance to be regarded in deciding upon the distinct and independent question of equitable jurisdiction: further than this, I have not been able to follow this branch of the Plaintiff's argument.[1]

[1] Mr. Fonblanque in a note, Bk. 1. ch. 1 § 3. f. 12, states the following: "The Court having acquired cognizance of the suit, for the purpose of discovery, will entertain it for the purpose of relief, in most cases of fraud, account, accident, and mistake; and for other reasons will entertain suits for partition and dower, though discovery be not necessary to the plaintiff's case." This language was modified by Hosmer, Ch. J., in *Isham* v. *Gilbert* (1819) 3 *Conn.* 166, 171. "If the defendant is bound to make discovery, and of this there exists no doubt, chancery will follow it up with relief, although a court of equity, which has acquired cognizance for the purpose of discovery will not, of course, grant relief; yet it will do it in most cases of fraud, account, accident and trust."

The same author in another part of his work says: "To strike out the distinguishing principle upon which courts of equity in such cases have proceeded, would be indeed extremely useful, but after having given considerable attention to the subject, I find myself incapable of reconciling the various decisions upon it."—1 Fonblanque Equity Bk. 6, ch. 3. § 6. n. (r).

Upon this Justice Story remarks, "What the learned author desired to as-

MILKMAN *v.* ORDWAY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1870.

[106 *Massachusetts* 232.]

Bill in equity, sworn to February 5, 1869, and filed February 6, 1869, by Sarah, wife of Bernard Milkman, against Thomas T. Ordway, George F. Ordway, and William Cumston.

The bill alleged, in good faith, an agreement (sublease) by the terms of which the plaintiff was to hold from the Ordways, themselves tenants of Cumston, for a specified time at a specified rent, certain premises as a store; it further alleged that it was intended to commit this agreement

certain has been found equally embarrassing to subsequent inquirers; and there is a distressing uncertainty in this branch of Equity Jurisdiction in England." After noting that in cases of account, accident and mistake there seem distinct grounds upon which the jurisdiction for discovery should incidentally carry the jurisdiction for relief, that is, either, the imperfect nature of the legal remedy, the compelling of the production of vouchers and documents, or the suppression of a multiplicity of suits, he further remarks that there are cases which are not easy to reconcile with the principles applicable in the cases mentioned.

"Some of them," he continues, "may have been adjudged on their own peculiar circumstances, or they may stand upon some ground, which leaves these principles untouched. Others are not susceptible of such a classification, and must either be rejected altogether, or be admitted to a considerable extent to overturn these principles." To this last statement, he prints the following note:—

"In Parker *v.* Dee (2 Chan. Cas. 200), the bill was against an executor for a discovery of assets, and payment; and relief was decreed by Lord Nottingham. In Bishop of Winchester *v.* Knight (1 P. Will. 406), the bill was for a discovery and an account of ore, dug by a tenant during his life, and by his heir, against the executor and heir; and the court maintained the suit, directing a trial at law, and after the trial granted relief. In Story *v.* Lord Windsor (2 Atk. 630), the bill was for an account of the profits of a colliery, upon a legal title asserted by the plaintiff; Lord Hardwicke sustained the bill for the account, because, he said, this is not a title of land, but of a colliery, which is a kind of trade; and therefore an account of the profits may be taken here. (See also Jesus College *v.* Bloom, 3 Atk. 262.) The same learned chancellor, in Sayer *v.* Pierce (1 Ves. 232), seems to have proceeded on the same ground, holding that the party, being out of possession of lands, generally, was not entitled to maintain a bill for an account of profits alone; but he retained the bill in that case, directing a trial at law upon the ground that it asked to ascertain boundaries. In Lee *v.* Alston (1 Bro. Ch. R. 194), a bill for an account of timber cut by a tenant for life, impeachable for waste, was entertained by Lord Thurlow, and relief granted. In Jesus College *v.* Bloom (3 Atk. 262; s. c. Ambler, R. 54), which was a bill for an account and satis-

to writing, but owing to a mistake or fraud of the Ordways the plaintiff's name had been omitted from the same, which omission rendered the agreement vague and uncertain; and that through an oversight she had failed to note the omission. The bill, after setting forth the agreement as it would stand if reformed to express the intent of the parties, further alleged full performance on her part of all her obligations under the agreement; that Cumston was, at the date of making the lease, fully informed of the entire transaction, and so had no right to cancel the lease without the plaintiff's consent; and, finally, the bill charged that the Ordways and Cumston, combining and confederating, and falsely pretending she was in default under the lease, had threatened to cancel it; that they had discharged each other from liability under their agreements, and had given her notice to quit the premises.

The bill prayed for an answer; an injunction to restrain them from

faction for waste, in cutting down timber before the assignment, against an assignee of the lessee of the plaintiffs, Lord Hardwicke said: 'Upon the opening of the case, the bill seems improper, and an action of trover is the proper remedy. Where the bill is for an injunction, and waste has been already committed, the court, to prevent a double suit, will decree an account and satisfaction for what is past.' And because the bill sought an account only against the assignee for waste before the assignment, and without praying an injunction, his lordship dismissed the bill. The same point was held in Smith *v.* Cooke (3 Atk. R. 378, 381). In Geast *v.* Barker (2 Bro. Ch. 61), the bill was for a discovery of the quantity of coal and coke sold from a mine let by plaintiff to defendant upon a reservation of one shilling for every stack of coal sold, &c., and prayed an issue, to try what quantity a stack should contain, and suggested a custom of the country. The Master of the Rolls (Lord Kenyon) said if it were now necessary either to decree account or dismiss the bill, he would do the latter, as he was clear the remedy was at law. (s. c. cited in Harwood *v.* Oglander, 6 Ves. 225.) Why the remedy and account should not be given in equity is not stated; and it is difficult to see, since it is clear that the bill was good for the discovery, and it was obtained. In Sloane *v.* Heatfield (Bunb. R. 18), the bill was for a discovery of treasure-trove and relief; and the court held it good for discovery, but that the plaintiff could not have relief, because he might bring trover at law. In Ryle *v.* Haggie (1 Jac. & Walk. 234) an opposite course was adopted, upon the professed ground of avoiding a multiplicity of suits, the party having a good ground to seek a discovery, and there being a remedy at law. In The Duke of Leeds *v.* New Radnor (2 Bro. Ch. R. 338, 519), Lord Thurlow reversed the decree of the Master of the Rolls, denying relief, because there was a remedy at law, upon the ground that the bill being retained for a year, the right to grant relief in equity was thus far admitted, and it ought to give entire relief. See Mr. Fonblanque's comments on this case, in 1 Fonbl. Eq. B. 1, ch. 3, §3, note (*g*), p. 156. See Mr. Blunt's note to the case of Jesus College *v.* Bloom, Ambler, 54; 1 Fonbl. Eq. B. 1, ch. 3, §3, note (*g*); ante, §64 *k* and note." 1 *Story Equity Jurisprudence* §66 *et seq.*

For a valuable discussion of the whole matter, see 1 *Pomeroy: Equity Jurisdiction, ch. 2, secs. 2 and 3.*

evicting her from the premises; for a reformation of her lease and a decree of specific performance of it when so reformed; and for general relief.

It appeared by Cumston's answer, and was afterwards established in the proofs that the Ordway lease was cancelled three days before the bill was filed; that this was done in consideration of the cancelling of another lease which had raised equities in Cumston's favor; that the original Ordway lease provided against underletting, with a provision for re-entry and determination; and that until after the cancellation of the Ordway lease, Cumston was ignorant of the plaintiff's written lease, he supposing her a tenant at will.

These circumstances rendering impossible specific performance by the Ordways, it was contended for them that the bill should be dismissed, and the plaintiff put to her remedy at law, which was adequate.[1]

WELLS, J. It is settled, with little or no conflict of authority, that when a defendant in a bill in equity disenables himself, pending the suit, to comply with an order for specific relief the court will proceed to afford relief by way of compelling compensation to be made; and for this purpose will retain the bill, and determine the amount of such compensation, although its nature and measure are precisely the same as the party would otherwise recover as damages in an action at law. The character of the investigation is, therefore, not an insuperable objection to this mode of proceeding.

There is also authority, though apparently questioned in the English decisions, for the application of the same rule when the disability was caused before suit, but after the date of the agreement relied on. In this country it seems to be generally accepted as the rule, provided the plaintiff brought his bill without knowledge of the disability, in good faith seeking equitable relief, supposing and having reason to suppose himself entitled to such equitable relief.

In the opinion of a majority of this court, there is equal ground in equity for applying the same rule, with the same qualifications, to all cases where a defect of title, right or capacity in the defendant to fulfil his contract is developed by his answer, or in the course of the hearing, or upon reference of his title or capacity, after an order of fulfilment.

The rule assumes, of course, a sufficient contract, performance or an offer to perform by the plaintiff, and every other element requisite, on his part, to the cognizance of his case in chancery; and that the special relief sought is defeated, not by any defence or counter-equities, but simply because an order therefor would be fruitless, from the inability of the defendant to comply. The jurisdiction is fixed by establishing the equitable right of the plaintiff. Relief might then be given by a decree in the alternative, awarding damages unless the defendant should secure the specific performance sought. In many cases, this would be an effective and proper course; inasmuch as the defendant, although not having

[1] The statement of facts has been abridged.

himself, at the time, the title or capacity requisite for such performance, might be able to procure it otherwise. The jurisdiction is not lost, when the court, instead of such alternative decree, determines to proceed directly to an award of damages or compensation. The peculiar province of a court of chancery is, to adapt its remedies to the circumstances of each case as developed by the trial. It is acting within that province when it administers a remedy in damages merely, in favor of a plaintiff who fails of other equitable relief, to which he is entitled, without fault on his own part. The diversity of practice in this respect, and the doubt as to the jurisdiction, we think must have arisen less from the nature of the relief to be afforded than from the character of the means for determining the amount of compensation to be rendered.

The usual mode of determining such questions in chancery is by reference to a master. If however the case be such as to require a jury to assess the damages, or to make that the more appropriate reference, it is then a matter of convenience and discretion only, whether to order such an assessment, upon an issue of *quantum damnificatus,* or to dismiss the bill and remit the parties to a trial in an action at law. The reason, from convenience, for sending such cases to an action at law, which often prevailed in the disposition made of them in the English practice, does not exist under the system in use in this Commonwealth, by which chancery powers are vested in the same court which exercises jurisdiction at law. See *Cory* v. *Thames Iron Works & Shipbuilding Co.* 8 Law Times (N. S.) 237; *Nelson* v. *Bridges,* 2 Beav. 239. So also of the doubt arising from the different nature of the two jurisdictions, and their comparative fitness for such investigations. *Bovill* v. *Hitchcock,* Law Rep. 3 Ch. 417. The objections to the trial of such questions in chancery proceedings are still further removed in this Commonwealth, by the recent provision introduced by the practice act, Gen. Sts. *c.* 131, § 60, that "in proceedings in equity the evidence shall be taken in the same manner as in suits at law, unless the court, for special reasons, otherwise directs;" as well as by the provision giving authority to order issues of fact to be tried by a jury either at the bar of the supreme judicial court or of the superior court. Gen. Sts. *c.* 113, § 22.

The cases of *Denton* v. *Stewart,* 1 Cox Ch. 258, and *Greenaway* v. *Adams,* 12 Ves. 395, which assert doctrines substantially like the propositions above stated, are supposed to have been overruled by Lord Eldon in *Todd* v. *Gee,* 17 Ves. 273. It is so distinctly declared by Lord Cottenham in *Sainsbury* v. *Jones,* 5 Myl. & Cr. 1. The opinions in the two latter cases do indeed restrict the right to have damages assessed in equity, the cases where the defendant has become disabled *pendente lite.* Lord Eldon in *Todd* v. *Gee* indicates that *Denton* v. *Stewart* decided nothing more than that. But, in a note to the report of the defendants' argument in the case, *Denton* v. *Stewart* is cited from the note of Sir Samuel Romilly as a case where the defendant had assigned his title after the agreement with the plaintiff; and in *Greenaway* v. *Adams,* Sir

William Grant says of *Denton* v. *Stewart,* "for in that the inability of the party to perform the contract grew out of an act done by the party after the contract had been entered into."

In *Sainsbury* v. *Jones,* Lord Cottenham speaks of Sir William Grant's case, *Gwillim* v. *Stone,* 14 Ves. 128, as one in which he refused to follow his own previous decision in *Greenaway* v. *Adams.* But in *Gwillim* v. *Stone* Sir William Grant says, after referring to *Denton* v. *Stewart* and *Greenaway* v. *Adams:* "This bill is of a different nature, asserting from the first that the defendant cannot make a good title." So far from refusing to follow his previous decision, he appears to us not only to affirm both decisions referred to, but to indicate where the true line of distinction is to be found. That distinction turns upon the character of the claim which the plaintiff establishes, and not upon the time or mode in which the defendant became unable to respond to a decree of the court for specific relief.

If, at the time the bill is filed, the plaintiff is aware that the defendant is unable to fulfil his contract, and that he can therefore have no equitable relief, " it is then reduced to the case of a bill filed for the sole purpose of assessing damages for a breach of contract." Per Kent, C., in *Kempshall* v. *Stone,* 5 Johns. Ch. 193. Chancellor Kent regarded "such knowledge a material circumstance in the case." The same consideration is mentioned in *Hatch* v. *Cobb,* 4 Johns. Ch. 559. See also *McQueen* v. *Chouteau,* 20 Missouri, 222. In *Phillips* v. *Thompson,* 1 Johns. Ch. 131, and *Parkhurst* v. *Van Cortlandt,* Ib. 273, the bill was retained for assessment of damages only, upon the principle of the decision in *Denton* v. *Stewart;* and the authority of that case was distinctly recognized. The same eminent chancellor, in the case of *Woodcock* v. *Bennet,* 1 Cowen, 711, ordered a reference to a master to assess damages, because, since the execution of the agreement, the defendant had disenabled himself to perform it. In the court of errors, the bill was dismissed upon other grounds; but the opinion delivered by Woodworth, J., approves of the doctrine of *Denton* v. *Stewart,* upon which the reference was ordered. In *Morss* v. *Elmendorf,* 11 Paige, 277, the principle is suggested as broadly, and substantially in the terms and with the limitations, as we have stated it; and again in *Wiswall* v. *McGowan,* Hoffm. Ch. 125, where it is ably discussed, and the authorities, particularly those in New York, collated. This last decision was reversed by the supreme court in 2 Barb. 270; but, upon appeal, the case was disposed of ultimately upon other grounds, (see 6 Selden, 465,) and the principle of *Denton* v. *Stewart* and *Woodcock* v. *Bennet* was soon after asserted in the supreme court. *Woodward* v. *Harris,* 2 Barb. 439.

The case of *Denton* v. *Stewart* is not without support from early English authorities. See *Hedges* v. *Everard,* 1 Eq. Cas. Ab. 18, pl. 7; *Cud* v. *Rutter,* 1 P. W. 570; *Wilkinson* v. *Torkington,* 2 Y. & Col. Exch. 726.

Its doctrine is fully adopted in Massachusetts: *Peabody* v. *Tarbell,*

2 Cush. 226; *Andrews* v. *Brown,* 3 Cush. 130; *Pingree* v. *Coffin,* 12 Gray, 288, 305; *Attorney General* v. *Deerfield River Bridge Proprietors,* 105 Mass. 1; and by other courts in this country: *Rees* v. *Smith,* 1 Ohio, 124; *Gibbs* v. *Champion,* 3 Ohio, 335; *Jones* v. *Shackleford,* 2 Bibb, 410; *Fisher* v. *Kay,* Ib. 434; *Slaughter* v. *Tindle,* 1 Littell, 358; *Rankin* v. *Maxwell,* 2 A. K. Marshall, 488; *Copper* v. *Wells,* Saxton, 10; *Berry* v. *Van Winkle,* 1 Green Ch. 269.

In England, authority to the full extent which we have maintained in this opinion has been recently conferred upon courts of chancery, or declared to belong to them, by St. 21 & 22 Vict. *c.* 27. This statute was rendered necessary by the doubts as to that authority, which have been entertained in consequence of the opinion of Lord Eldon as expressed in *Todd* v. *Gee.* We do not regard the statute as necessary for that purpose, except by reason of such doubts; being satisfied that the authority belongs to the courts as incident to its chancery jurisdiction, and essential to the complete exercise of that jurisdiction. The second section of the statute is as follows: "In all cases in which the court of chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance; and such damages may be assessed in such manner as the court shall direct. This statute is held to apply only to cases which are of equitable cognizance in their essential character. *Durell* v. *Pritchard,* Law Rep. 1 Ch. 244.

In New York, the right of the plaintiff in a bill in equity to have damages assessed, instead of specific relief, is now held to be even much more extensive, under the code of practice in force there. *Barlow* v. *Scott,* 24 N. Y. 40. *Genet* v. *Howland,* 45 Barb. 560.[1]

Section 5. Multiplicity of Suits.

LYNCH *v.* METROPOLITAN ELEVATED RAILWAY CO.

In the Court of Appeals of New York, 1891.

[129 *New York* 274.]

Gray, J. This action was brought to restrain the maintenance and operation of the defendants' roads in front of the plaintiff's premises, and the prayer for such a judgment included also a demand for the amount of loss and damage which might be ascertained to have been

[1] The balance of the opinion discussing the facts of the case has been omitted.

already sustained by the plaintiff. The complaint sets out the title and ownership of the plaintiff and his rights in and to the street in front of his premises; the construction of the elevated railroad and the operation of trains over it and the annoying results therefrom; the illegal and unauthorized nature of the trespass upon the plaintiff's premises and easements, and the failure of the defendants to acquire, or to make compensation for them; the injuries sustained, and that they will be constant and continuous, and, finally, that, to prevent a multiplicity of suits, to protect against irreparable damages and to afford complete relief, the plaintiff is compelled to seek the equitable interference of the court. When the action came on for trial, the defendants' counsel moved for a trial of the plaintiff's claim for past damages by jury, and the exception to the denial of that motion raises the main question presented upon this appeal.

The clause of the Constitution, upon which the demand for a jury trial was based reads: "The trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever." The argument for the appellants is, in substance, that there were two independent causes of action stated in the complaint; of which one was for past damages, which, prior to the Constitution of 1846, was cognizable solely in a court of law, and that under the Code it comes within the equity jurisdiction of the court only by reason of the permission to join in one complaint legal and equitable causes of action. By section 970 of the Code of Civil Procedure, which was a new enactment, it is provided that "where a party is entitled by the Constitution, or by express provision of law, to a trial by a jury of one or more issues of fact * * * he may apply upon notice to the court for an order directing all the questions arising upon that issue to be distinctly and plainly stated for trial accordingly," whereupon the court must so order, etc. If the defendants believed that they had a constitutional right to a jury trial of some issue of fact in this action, it would have been the natural and orderly way for them to make an application to the court under this section. The complaint appears to be but one consecutive narrative of the grounds upon which the equitable interference of the court is alleged to be necessary. The pretense that there is a separate cause of action rests only upon the demand of the complainant that, if he is entitled to the equitable relief of an injunction, the court shall adjudge to him such an amount for the loss sustained by the defendants' acts as shall be ascertained.

Undoubtedly, the claim for past damages, sustained by plaintiff in his property rights from the defendants' acts, could have been made the subject of an action at law; but that was not the cause of action which the plaintiff elected to assert in his complaint and to bring to trial. What he attempted by instituting his action was to restrain the continuance of acts, which were constantly injuring and would, to all appearances, constantly in the future continue to injure him, in ways and in a man-

ner which he described in his complaint. That was a form of relief demandable and cognizable only on the equity side of the court. Hence, as upon the face of the complaint, the plaintiff alleged a cause of action for equitable relief, if the defendants conceived that they were entitled to a trial by jury of any issue of fact involved in the statements of the complaint, they might have moved the court under section 970, and then the question could have been opportunely and properly met. Appellants cite upon this point the decision in *Coleman* v. *Dixon* (50 N. Y. 572), but that was made in 1872, and section 970 was a new provision and was enacted in 1877.

But, whatever the effect of the omission to take this course of procedure, we need not determine it now; inasmuch as the conclusion we have reached holds the right to a separate trial by jury, as to the amount of past damages, in such an action not to be within the purview of the constitutional guaranty. The action was one purely for a court of equity; for the main relief sought was an injunction against the defendants, restraining them from maintaining and operating their elevated railroad. To the assertion of this ground for the equitable interference of the court, the facts in the complaint were marshalled, and to the necessity for granting that species of relief every allegation of the complaint was framed and calculated to lead. There was but one cause of action stated in this complaint, and that was the claim for relief against the continued trespass upon the complainant's properties. The demand for past damages, included in the prayer for judgment, does not have the effect to set up an independent cause of action. It is nothing more than a demand that the court, having adjudged the plaintiff entitled to the equitable relief prayed for, and having acquired entire jurisdiction of the action, will assess the damages which appear to have been sustained down to the trial.

It has always been a well-settled and familiar rule that when a court of equity gains jurisdiction of a cause before it for one purpose, it may retain it generally. To do complete justice between the parties a court of equity will further retain the cause, for the purpose of ascertaining and awarding the apparent damages, as something which is incidental to the main relief sought. While this is done on the ground that the remedy for the damage done is deemed to be incidental to the relief of injunction, the principle is in perfect harmony with the theory of the jurisdiction of a court of equity. Its power is invoked, and it interferes to restrain a trespass, which is continuous in its nature, in order to prevent a multiplicity of suits, and, taking jurisdiction of the cause for such a purpose, it may retain it to the end and close up all matters for legal dispute between the parties by assessing the loss sustained from the acts which it has restrained.

The power and practice of courts of equity were, as it was forcibly remarked by Judge EARL in the case of *Madison Avenue Baptist Church* v. *Oliver Street Baptist Church* (73 N. Y. 82, 95): "When they have

once obtained jurisdiction of a case to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties."

The fact that a money judgment is ordered against the defendant for the plaintiff's loss affords no peculiar ground for attacking equity's jurisdiction. That is frequently the case in actions of an unquestioned equitable nature. Quite recently Judge FINCH, in *Van Rensselaer* v. *Van Rensselaer* (113 N. Y. 207), observed with respect to an objection to the jurisdiction of a court of equity that the final relief would be a personal judgment, that it should not in that manner lose its jurisdiction of an action of an equitable character. The jurisdiction "once acquired," he said, "it retains to the end, even though it may turn out that adequate relief is reached by a merely personal judgment. That is not an uncommon occurrence."

Instances are frequent in which a court of equity decrees the payment of money as an incident of the grant of equitable relief, and that feature does not suffice to qualify the jurisdiction. But I think we should consider the question to have been settled, upon the authority of several decisions of this court. In the case of *Williams* v. *New York Central Railroad Company* (16 N. Y. 97), the opinion was delivered by Judge SAMUEL SELDEN. That was a suit in equity, brought to restrain the defendants from using the street with their railway and to recover damages for past use. The conclusion arrived at, as expressed in the opinion, was that "it follows that the defendants in constructing their road * * * were guilty of an unwarrantable intrusion and trespass upon the plaintiff's property, and that he is entitled to relief. Although he had a remedy at law for the trespass, yet, as the trespass was of a continuous nature, he had a right to come into a court of equity and to invoke its restraining power, to prevent a multiplicity of suits, and can, of course, recover his damages as incidental to this equitable relief. There may be doubt as to his right to recover in this suit the damages upon the lots which have been sold; because as to those lots there was no occasion to ask any equitable relief, and to permit the damages to be assessed in this suit, in effect, deprives the defendants of the right to have them assessed by a jury. But, as this question has not been raised, it is unnecessary to consider it."

There are two things to be noted in that opinion. In the first place, the damages already sustained were deemed within the power of a court of equity to award, as an incident of its jurisdiction over the action. This idea is, in fact, emphasized by the suggestion as to the lots which had been sold; because it is clear that the court regarded its right to award the damages as a matter connected with, or dependent upon, the ground for granting any equitable relief; that is to say, as to the property to be protected by the decree of the court against the defendants' acts, the damages caused to it could be assessed by the court; but as to that portion withdrawn by the sale it might be doubtful, because not

the subject of, or entitled to, the equitable relief. It is very obvious that the court had in mind the question as to the right of trial by jury. In the second place, it may be noted that the opinion speaks of the assessment of the damages. This definition of an assessment of the damages seems to me to put the action of the court in line with just what courts of equity have always done in cases over which they have gained jurisdiction; that is to say, they proceed to inquire directly, or by reference, or otherwise, as to the damages sustained and assess them accordingly. When, later, the same case, entitled as *Henderson et al.*, after a new trial, came up again (78 N. Y. 423), the opinion of the court was delivered by Judge DANFORTH, who again upheld the plaintiff's right to invoke the equitable power of the court, and held that he could, "of course, recover his damages as incidental to this equitable relief;" and he stated it to be "an elementary principle" that "when a court assumes jurisdiction in order to prevent a multiplicity of suits it will proceed to give full relief both for the tortious act and the resulting damages." The opinion was carefully written and based upon the authority of many cases.

Recently, again, in the case of *Shepard* v. *Man. R. Co.* (117 N. Y. 442), it was said of these actions that they were necessarily "on the equity side of the court, as the main relief sought was the injunction against the defendants," and that in them the complainants could "recover the damages they have sustained as incidental to the granting of the equitable relief." This view, as stated in that opinion, was expressly based upon the *Williams* and *Henderson* cases and upon the supposed equitable principles governing such actions.

The *Shepard* case, somewhat conspicuously, illustrates the powers a court of equity may arrogate to itself with the object of completely determining and quieting the questions before it, when it has once acquired jurisdiction of the action. It follows, in that respect, a rule long established by authority. It is true that in these cases the right to demand a jury trial as to past damages was not precisely, or in terms, stated as the proposition advanced; but that, as it seems to me, would be a very narrow evasion of the effect of the opinion delivered. They did consider the nature of such actions and deliberately declared the power of the court in equity, as an incident of the main relief of injunction, to assess the damages sustained.

In *Carpenter* v. *Osborn* (102 N. Y. 552), the court, in an action to set aside certain conveyances as fraudulent, granted the equitable relief prayed for, and, in addition, decreed the judgment a lien upon the land for some unpaid installments of interest, to the payment of which the defendant had obligated himself in a certain agreement. Chief Judge RUGER delivered the opinion of this court in affirmance of the judgment and said: "This principle has been applied in many cases, in awarding judgment for pecuniary damages, even when the party had an adequate remedy at law, if the damages were connected with a transaction over which the courts had jurisdiction for any purpose; although

for the purpose of collecting damages merely they would not have had jurisdiction." In support of the principle declared by him, the learned judge cited Pomeroy's Equity Jurisprudence (§ 181), and various cases.

I think some confusion of thought concerning the constitutional guaranty of a trial by jury may arise in a misapprehension as to its proper application. That provision relates to the trial of issues of fact in civil and criminal proceedings in the courts; as it was held by the chancellor in the case of *Beekman* v. *Saratoga & S. Railroad Co.* (3 Paige, 45). Where the trial of a civil proceeding presents for determination a question of fact, the right of trial by jury is proper and can be invoked. But an action brought to restrain the commission of trespasses, which are continuous in their nature, is necessarily in equity, and the court interferes, to prevent multiplicity of suits, and grants equitable relief by way of an injunction. The question presented for determination in such an action is one of law, whether, upon the facts to be established upon the trial, the plaintiff is entitled to such relief. Upon the proofs, showing the nature of the trespasses, and the consequent injury to the complainant's property, the court decides the question of plaintiff's right to an injunction. It does not seem to me that it can be said that any issue of fact as to damage remains. That was necessarily decided in the action, and all that remains is to fix its amount; and I do not think the constitutional provision was aimed at such a proceeding. As defined by the chancellor in the case above referred to, it seems difficult to rationally give it an application to what is simply an assessment of the damages.

I may extract, and may appositely quote here, a remark of Judge ANDREWS in his opinion in *Cogswell* v. *N. Y., N. H. & H. Railroad Company* (105 N. Y. 319): "We think," he says, "it is a reasonable rule, and one in consonance with the authorities, that where a plaintiff brings an action for both legal and equitable relief, in respect to the same cause of action, the case presented is not one of right triable by jury under the Constitution." The case was one wherein the plaintiff's complaint demanded judgment for damages and an abatement of a nuisance, and also for an injunction against its continuance. The learned judge's opinion is upon the question of whether such an action was one for a nuisance, under section 968 of the Code, which must be tried by jury, unless waived or referred, and he held that it differed from *Hudson* v. *Caryl* (44 N. Y. 553), which was a common-law action, in that equitable relief by way of injunction was asked, and not simply the relief obtainable by writ of nuisance for damages and an abatement. His remark upon the right to a jury trial in equitable actions is not out of place, however, here.

To carry this discussion backwards, and to a time anterior to decisions of this court, we find warrants in the opinions then held by our own and the English chancery courts for holding that a trial by jury was

not usual in cases where equity had acquired jurisdiction, and that the court would administer all the relief which the facts warrented, including the assessment and awarding of compensation for injury sustained. In *Watson* v. *Hunter* (5 Johns. Ch. 169), the bill was filed to enjoin the cutting of timber and to restrain the removal of that which had already been cut. Chancellor KENT confined the relief of injunction to the timber standing, and refused it as to the removal of the cut timber, on the ground that it would be an application to an "incidental remedy." He said that "the practice of granting injunctions in cases of waste is to prevent or stay the *future* commission of waste; and the remedy for waste already committed is merely *incidental* to the jurisdiction in the other case, assumed to prevent multiplicity of suits and to save the party the necessity of resorting to *trover* at law."

The chancellor's exposition of the principle upon which equity acts in cases of waste, obviously, is as applicable to cases of trespass. If the action at law in trover was deemed unnecessary for the personal property already converted in that case, it seems unnecessary in such an action as this, in order to recover the loss sustained from the trespass. The chancellor in the *Watson* case relied upon the practice followed by the English chancellors. Lord HARDWICKE, in *Garth* v. *Cotton* (1 Vesey, Sr., 528), had held that the decree for the waste already committed was an incident to the injunction to stay waste. Before that, in *Jesus College* v. *Bloom* (3 Atk. 262), where the bill was filed for an account and satisfaction for waste in cutting trees, and no injunction was prayed for, Lord HARDWICKE said that the bill was improper and that an action of trover was the remedy. He asserted the rule, however, that where the bill was for an injunction to prevent waste, and for waste already committed, the court, to prevent a double suit, would award an injunction to prevent future waste and decree an account and satisfaction for what was past. He held that to prevent multiplicity of suits the court will, on bills for injunction, make a complete decree and give the injured party a satisfaction for what had been done, and not oblige him to bring another action at law. In the subsequent case of *Smith* v. *Cooke* (3 Atk. 381), the same lord chancellor declared the same doctrine; as did also Lord THURLOW in *Lee* v. *Alston* (1 Ves. 78). I quote a remark of Lord NOTTINGHAM, in *Parker* v. *Doe* (2 Ch. Cases, 201), that when a Court of Chancery has once gained possession of the cause, if it can determine the whole matter, it will not be the handmaid of other courts, "nor beget a suit to be ended elsewhere."

In our former Court of Errors, Chancellor (then Judge) KENT held, in *Armstrong* v. *Gilchrist* (2 Johns. Cases, 424, 431, decided in 1800), that "the Court of Chancery, having acquired cognizance of a suit for the purpose of discovery or injunction, will, in most cases of account, whenever it is in full possession of the merits and has sufficient materials before it, retain the suit in order to do complete justice between the parties and to prevent useless litigation and expense." That case was

upon a bill for specific relief and to restrain an action at law brought to recover the value of certain bank stock, and it set up certain equitable considerations as against the justice of a recovery in the other action. The chancellor below decided against the whole relief sought by the bill, and decreed in favor of the defendants that the complainants should pay them the value of the stock and ordered a reference to state the account. This procedure the Court of Errors upheld as being right and the duty of the chancellor to follow.

I do not consider the cases cited by the appellants to be at all controlling upon the question. In *Murray* v. *Hay* (1 Barb. Ch. 59), the bill was filed by two persons, who were owners of different dwelling-houses, in severalty, having no joint interest in either of them, to restrain a nuisance which was a common, but not a joint, injury to both complainants. The objection to the prayer for an account and compensation for their respective damages was upon the ground of multifariousness, and so considered. Another case of *Hudson* v. *Caryl,* (44 N. Y. 553), was an action to recover damages for the overflowing of plaintiff's lands and to compel the removal of the dam; and the decision turned upon the ancient right to a jury trial, in such an action of nuisance, which the Code had not affected. It was not an action in equity to restrain a nuisance, which, according to Judge ANDREWS' opinion in the *Cogswell* case (*supra*), would not be an action for a nuisance directed by the Code to be tried by jury.

But the judge who delivered the opinion of the majority of the Commission of Appeals, in *Hudson* v. *Caryl,* spoke *obiter* in his remarks upon the general right of trial by jury, as his opinion indicates, for he says (p. 555): "But whatever may be said or decided in regard to the trial of other actions, in which two causes of action, one exclusively of legal and another exclusively of equitable cognizance, arising out of the same transaction, are united, this action should, for an independent reason, have been tried by jury, and that is, that the action, when brought for the double object of removing the nuisance and recovering the damages occasioned by it, was always tried by jury;" and he proceeds to refer to Blackstone and to the old Revised Statutes. As, therefore, "a case is presented in which a trial by jury has been heretofore used," the commissioner concluded it was error to refuse it.

It does not seem to me necessary to pursue further the consideration of authorities. The respondent's counsel has cited others, in this and the lower courts. In a note to *Armstrong* v. *Gilchrist* (*supra*) will be found reference to other early cases in this state, and in the United States Supreme Court, in support of the "settled rule, that when the Court of Chancery has gained jurisdiction of a cause for one purpose, it may retain it generally for relief." Underlying the system upon which courts of equity have exercised their power, as I understand it, is the principle that when they have gained jurisdiction of a cause by reason of the infirmity of the courts of law to entertain it, or to give full relief,

they will retain their control of the cause generally, and settle up the whole matter between the parties.

I have discussed the question here at considerable length, in order that a rule, long settled by careful judicial utterances, and, in itself, reasonable and commendable as promoting the public convenience in the disposition of litigated causes, might not, at this day, be shaken by doubts. The conclusion which, I think, we must reach is that, in this complaint, the cause of action is single and constitutes a claim for equitable relief, and there is not mixed up with it a cause of action for legal relief.

The facts alleged as a basis for an appeal to the court to exert its equitable power may well have constituted a claim for legal relief, and might have been set up in an action at law; but that consideration cannot affect nor change the equitable nature of the action itself.

It was not error, therefore, to deny the motion for a trial by jury as to past damages, and the court could competently proceed with the trial of the cause in equity.

The only other point, presented to us upon this appeal, is that it was error to award damages for portions of the property which were in the possession of tenants. As to this question the case is controlled by the decision of the *Kernochan* case, at this term.

The judgment should be affirmed, with costs.

All concur, except EARL and PECKHAM, JJ., dissenting.

Judgment affirmed.

CHAPTER IV.

FUNDAMENTAL PRINCIPLES AND MAXIMS CONTROLLING THE EXERCISE OF EQUITY JURISDICTION.

SECTION 1. GENERAL PRINCIPLES.

ANONYMOUS.

IN CHANCERY, BEFORE JOHN MORTON, M. R., 1479.

[*Cary* 21.]

A. made a deed of feoffment to his own use to B., but gave no livery of seisin. A. dieth: C., his heir, bringeth a subpœna against B.; but by *Morton,* Master of the Rolls, C. was denied help here, because B. had nothing in the land; and if he abate, there is remedy at the common law against him.

ANONYMOUS.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1752.

[2 *Vesey, Senior* 414.]

Motion for injunction to stay the use of a market set up by defendant *Brown.*

Lord Chancellor refused it, saying this was a most extraordinary attempt, of which he never knew an instance before. The plaintiff has several remedies: there may be a *Scire facias* in the name of the crown to repeal letters patent granting a market to the prejudice of his market as being too near thereto; or without the aid of the crown he may have

a common action upon the case for the prejudice to his market; * whereas the plaintiff comes originally into court for this injunction. What great confusion would it cause to bring all the persons who use this market into contempt upon the injunction; and to what purpose? If in any case this court ought to interpose, it would be after the title was established at law; which is done here, though there are so many means of doing it. Injunctions are granted to quiet in possession, as at the time of filing the bill and three years before: but that is drawn from the equity on the statutes of forcible entries. Upon the equity founded on that statute, where there has been such possession for three years, this court will prevent beforehand: but there is no such statute in this case: it is founded on the common law, which gives the abovementioned remedies. This court will not interpose before the title at law is established: though I will not say, that even then the court will not interpose, because of the inconveniences.

WATSON *v.* SUTHERLAND.

IN THE SUPREME COURT OF THE UNITED STATES, 1866.

[5 *Wallace* 74.]

Appellants, Watson & Co., levied on certain goods—a miscellaneous stock in retail trade, suitable for the then current season, and intended to be paid for out of the sales, the goods being in the possession of the appellee, Sutherland, a young man but a few years from Ireland, and only recently established in trade but doing a profitable business. From the time of his immigration until setting up in business for himself, he had, so the answer set forth, "been salesman in a retail dry goods store, at a small salary, so low as to have rendered it impossible for him to have saved from his earnings any sum of money sufficient to have made any real purchase of the stock." The appellants alleged that these goods had been transferred to appellee by a bankrupt firm. Wroth & Fullerton, fraudulently, to defeat and hinder creditors. Sutherland filed

*A bill to be quieted in possession, by one who possessed a water-course for sixty years, was allowed, against a mortgagee who foreclosed the equity of redemption, though the title at law was not established. Prec. Ch. 530. Vide 1 Vern. 120, 129; 2 Atk. 302; 3 Atk. 726; 1 Vol. 476. In the latter cases an injunction was refused, till the title was established at law.—Reporter's note.

the present bill for an injunction to restrain further prosecution by the appellants of the writs, issued on their judgments against the bankrupts, alleging exclusive ownership of the property, and, by reason of the season, the nature of the goods, and his own financial condition, irreparable injury and commercial ruin if they were permitted to sell him out. The lower court granted a temporary injunction, which, on full hearing, was made permanent. From this decision, the appellants brought this appeal.[1]

Mr. Justice DAVIS delivered the opinion of the court.[2]

There are, in this record, two questions for consideration. Was Sutherland entitled to invoke the interposition of a court of equity; and if so did the evidence warrant the court below in perpetuating the injunction?

It is contended that the injunction should have been refused, because there was a complete remedy at law. If the remedy at law is sufficient, equity cannot give relief, "but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity." How could Sutherland be compensated at law, for the injuries he would suffer, should the grievances of which he complains be consumated?

If the appellants made the levy, and prosecuted it in good faith, without circumstances of aggravation, in the honest belief that Wroth & Fullerton owned the stock of goods (which they swear to in their answer), and it should turn out, in an action at law instituted by Sutherland for the trespass, that the merchandise belonged exclusively to him, it is well settled that the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it, when taken, with interest from the time of the taking down to the trial.

And this is an equal rule, whether the suit is against the marshal or the attaching creditors, if the proceedings are fairly conducted, and there has been no abuse of authority. Any harsher rule would interfere to prevent the assertion of rights honestly entertained, and which should be judiciously investigated and settled. "Legal compensation refers solely to the injury done *to the property taken,* and not to any collateral or consequential damages, *resulting to the owners,* by the trespass." Loss of trade, destruction of credit, and failure of business prospects, are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law.

Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity

[1] A statement of facts has been substituted for that in the report.

[2] Only a part of the opinion is printed.

steps in, arrests the proceedings *in limine;* brings the parties before it; hears their allegations and proofs, and decrees, either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case, as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued.[1]

MERCHANTS NATIONAL BANK *v.* PAINE.

IN THE SUPREME COURT OF RHODE ISLAND, 1882.

[13 *Rhode Island* 592.]

February 11, 1882. DURFEE, C. J. The bill alleges that Walter Paine, 3d, one of the defendants, is indebted to the complainant by promissory note in the sum of five thousand dollars and interest, and seeks to obtain payment thereof out of certain equitable interests, which came to him under the will of his father, and which he is alleged to have conveyed to one of his co-defendants for the purpose of defeating the claims of the complainant. The bill also alleges that between the making and maturity of the note said Paine absconded, so that he cannot be found either in this State or in Massachusetts, the State of his domicile, and that he has left no property in this State which the complainant can attach and thereby secure service in any action to recover judgment against him, and that the complainant has exhausted all its remedies at law. The defendant demurs to the bill on the ground that it does not

[1] "I have no doubt this was a case of equity jurisdiction. I do not say there was no defence at law; but the remedy was doubtful," *Per Spencer, J.*, in *Rathbone* v. *Warren* (1813) 10 Johns. 587, 595. And see Chancellor Walworth's opinion in *American Ins. Co.* v. *Fisk* (1828) 1 Paige 390.

"We have the authority of Lord Hardwicke, that if a case was doubtful, or the remedy at law difficult, he would not pronounce against the jurisdiction of this Court. The same principle has been laid down by Lord Bathurst." —*Per Buller, J.*, in *Weymouth* v. *Boyer* (1792) 1 Ves. Jr. 416, 424.

"The defendant's printed argument is mainly devoted to the support of the proposition that the case is not within the jurisdiction of a court of equity, and that if it is technically cognizable there, the evidence should have induced the chancellor to dismiss the plaintiff's bill, and thus referred the parties to another tribunal for an adjustment of their disputes. We do not assent to this view of the case. There is certainly no reasonable grounds for denying

appear by the bill that the claim of the complainant has ever been reduced to judgment at law, or that execution has ever been sued out thereon.

The question is whether a suit in equity can be maintained to enforce payment of a purely legal claim out of equitable assets before the claim has gone to judgment and execution at law. The counsel for the complainant admit that as a rule it cannot; but they contend that the only reason why it cannot is because a court of equity will not interpose until the creditor has exhausted his remedies at law, and because the best evidence that he has exhausted them is a judgment, when recoverable, with execution sued out thereon and returned unsatisfied for want of property. And they also contend that, when this evidence cannot be procured because the debtor is absent or has absconded, leaving no attachable estate, the court will proceed without it upon other satisfactory proof. They cite a Kentucky case in which this view is fully sustained by judicial decision. *Scott* v. *McMillen,* 1 Litt. 302. They also cite cases which contain favorable *dicta,* some of which appear to have been expressed after careful consideration. *Russell* v. *Clark's Executors,* 7 Cranch, 69, 89; *Miller* v. *Davidson,* 8 Ill. 518, 522; *Greenway* v. *Thomas,* 14 Ill. 271; *Anderson* v. *Bradford,* 5 J. J. Marsh. 69; *Meux* v. *Anthony,* 11 Ark. 411, 418. They cite other cases which hold that a judgment creditor may resort to equity before execution when, the debtor being insolvent, the execution would manifestly be of no avail. *Turner* v. *Adams,* 46 Mo. 95, 99; *McDermutt* v. *Strong,* 4 Johns. Ch. 687, 689. And they cite a New York case in which the court expressed itself strongly in support of the jurisdiction, in favor of a creditor who was prosecuting a judgment recovered in another State. *McCartney* v. *Bostwick,* 32 N. Y. 53.

Besides these cases, cited by counsel, we have found other cases which emphatically support the same view, cases, indeed, from which it appears that the jurisdiction contended for has been unequivocally affirmed in

that in view of the nature and subject matter of the controversy a court of equity affords the most convenient remedy for a just disposition of the questions involved in it, while a remedy afforded by a court of law is obviously inconvenient, and the adequacy of it is at least doubtful. In Appeal of Brush Electric Co., 114 Pa. St. 574, Mr. Justice Gordon said: 'A bill may be sustained solely on the ground that it is the most convenient remedy.' In support of this statement he cited *Kirkpatrick* v. *McDonald,* 11 Pa. St. 393. See, also, on this point, *Drake* v. *Lacoe,* 157 Pa. St. 17, and *Warner* v. *McMullin,* 131, Pa. St. 370. The cases of *Whiteman* v. *Fayette Fuel Gas Co.,* 139 Pa. St. 492, and *Scwickley Borough School Dist.* v. *Ohio Valley Gas Co.,* 154 Pa. St. 539, are also in point."—*Per McCollum, J.,* in *Conemaugh Gas Co.* v. *Jackson Farm Gas Co.* (1898) 186 Pa. St. 443, 454; S. C. 65 Am. St. Rep. 865, 866, and notes.

"In the present case, we think it sufficient, that the remedy in equity is more adequate, and better adapted to reach the justice of the case, and more complete by being at once more comprehensive and effectual."—*Per Shaw, C. J.,* in *Bemis* v. *Upham* (1832) 13 Pick. 169, 171.

Kentucky, Virginia, Indiana, South Carolina, and Missouri. *Scott* v. *McMillen, supra; Peay* v. *Morrison's Executors,* 10 Gratt. 149; *Kipper* v. *Glancey,* 2 Blackf. 356; *O'Brien* v. *Coulter,* 2 Blackf. 421; *Farrar* v. *Haselden,* 9 Rich. Eq. 331; *Pendleton* v. *Perkins,* 49 Mo. 565. In the last cited case the court, after reviewing the other cases, say, p. 568: "It seems thus to be satisfactorily settled upon authority that when the debtor has absconded, so that no personal judgment can be obtained against him, and there is no statutory proceeding by which his property can be reached, a creditor's bill will lie, in the first instance, and from the necessity of the case. It is analogous to a proceeding to subject the equities of a deceased debtor, or to satisfy a debt from a specific equitable fund, as to enforce a lien, in neither of which cases is a personal judgment required."

If it were true that the only reason for the rule is the exhaustion of legal remedies, we should not hesitate at all to assert the jurisdiction, for very clearly where no legal remedy exists, none can be exhausted, and the reason for the rule would cease, and with the reason the rule itself. *"Cessante ratione legis, cessat ipsa lex."* There is, however, another reason for the rule, namely, that a court of law is the proper tribunal not only to afford a remedy for legal claims, but also to adjudicate them. It seems to be well settled, however, that a creditor may proceed in equity without first getting judgment at law, if his debtor be dead. And if he can so proceed, if his debtor be dead, there can be no insuperable reason against his so proceeding while his debtor is alive. *Thompson* v. *Brown et al.* 4 Johns. Ch. 619; *O'Brien* v. *Coulter,* 2 Blackf. 421; *Steere* v. *Hoagland,* 39 Ill. 264; *The Unknown Heirs of Whitney* v. *Kimball,* 4 Ind. 546; *Thorp* v. *Feltz, Administrator,* 6 B. Mon. 6; *Everingham* v. *Vanderbilt,* 19 N. Y. Supreme Court, 75; *Offutt* v. *King,* 1 McArthur, 312. If the claim be one that is peculiarly fit for legal, or peculiarly unfit for equitable cognizance, issues can be framed for jury trial. The jurisdiction ought to be, if it can be, upheld, since without it a debtor may have valuable property and yet escape the payment of his debts. Our conclusion is, so far as this point is concerned, that the suit can be maintained.

ATKINSON *v.* LEONARD

IN CHANCERY, BEFORE LORD CHANCELLOR THURLOW, 1791.

[3 *Brown's Chancery Cases* 218.]

Motion to discharge a writ of *ne exeat regno,* obtained against defendant. The plaintiff's affidavit on which he obtained the writ stated that the defendant and himself were inhabitants of Antigua; that the

plaintiff had advanced various sums of money to the defendant, who was his brother-in-law; that the defendant coming into bad circumstances and having given to other creditors bonds and powers of attorney to confess judgments, on which bonds and powers judgments had been entered for considerable sums, the plaintiff asked for and received similar instruments in his own favor; that during his absence from home the defendant gained possession of these instruments which he removed; that the plaintiff had never since been able to recover them; that both parties were now in England; that the plaintiff had made several demands upon the defendant for money due, but had obtained only a small sum; that the defendant intended soon to leave England without giving security for the plaintiff's demands, and if he did so, the plaintiff would be in great danger of losing his money.

Upon this writ, the defendant was arrested and gave bail; and put in his answer to the plaintiff's bill, admitting the execution of the bond and warrant of attorney, but stating claims upon the plaintiff.

The defendant's motion to discharge the writ was based on the ground that the plaintiff had his remedy at law, since the action was on a lost bond, *oyer* of which was now, under proper circumstances, excused.[1]

Lord *Chancellor.*[2]—The real question is, whether there is a sufficient equitable demand to sustain this equitable process.—I should be sorry a process should depend on so precarious circumstances as those stated. The case in *Ambler* did not go to the length now urged; the Court thought he must give security to the extent of the demand. Lord *Hardwicke* is there made to take a difference between the *English* law, as administered at *Gibraltar,* and the *Spanish* law at *Minorca.* In both cases justice would be equally certain. Lord *Northington* thought the process ought not to be extended to foreigners; that could only apply where the justice of the case would be equally certain to be done. When the question is only between a *ne exeat regno,* and taking security, I easily lean to the latter; because, beyond securing the demand, I think there is no reason for the *ne exeat.* The justice of the Court being satisfied, I think it would be better to abandon the process, than to apply it where the pur-

[1] While it is not safe to vouch for Lord Thurlow's private or public character, his law is sound. Sir R. Pepper Arden, M. R. said of him in *Carruthers* v. *Carruthers* (1794) 4 *Bro. C. C.* 11: "That is an express decision by Lord Thurlow, * * * and though it has not the sanction of the House of Lords, it is the opinion of a great judge."

The student who enjoys good English and who wishes a vivid portrait of the legal advisers of the British Government during the American troubles, Thurlow and Wedderburn (later Lord Lougborough)—"The Moloch and the Belial of their profession"—is referred to Lecky's England in the XVIIIth Century (New Edn) Vol. IV. pp. 465-466: "On a single question the excellence of the slave trade—he [Thurlow] appears to have had a genuine conviction arising almost to enthusiasm."

[2] The statement of facts has been abridged.

pose can be answered by giving security; *it should be used only to compel the party to abide by the justice of the case.*

I shall not contradict the case in the King's Bench (*Totty* v. *Nesbit*) [1] being law; but the question is, whether this Court is ousted of its jurisdiction, so that a demurrer would lie to a bill, for a lost bond, and it must be dismissed: I thought there had not been any such way of declaring, but there must be a *profert;* but, as it is, there must be proof of the bond's having had existence and being lost. But it does not follow, because the court of law will give relief, that this Court loses the concurrent jurisdiction which it has always had: and till the law is clear upon the subject, the Court would not do justice in refusing to entertain the jurisdiction.

Therefore the writ must be discharged, on giving such security as the Master shall think proper, to pay what shall be found due upon the account.

[1] The case is thus reported in a note in 3 Term Reports 153—

Totty v. *Nesbit,* Tr, 24 Geo. 3 B. R.

Peckham moved for a rule to show cause why the defendant should not waive his demand of *oyer* and plead. This was an action on a bond. The plaintiff had before filed a bill in the exchequer for a discovery, and the defendant in his answer admitted that he had executed such a bond, and that he had destroyed it.

Buller, J.—You have declared with a *profert;* and after that the Court cannot say that the defendant shall not have *oyer.* You should have declared that the bond was destroyed, and then it would have appeared on the record that the defendant was not entitled to *oyer.* All we can do for you is to order that the production of a copy shall be *oyer.*

But the plaintiff having no copy of the bond, and only the substance of it being stated in the bill in the Exchequer, *Peckham* obtained a rule to show why the declaration should not be amended.

The same note reports Ashurst to have said, in the case of *Matison* v. *Atkinson,* E. 27 G. 3 B. R. that the better way in case of a lost or destroyed instrument was for the plaintiff to state in his declaration circumstances to excuse *profert.*

The doctrine excusing profert seems not to have been finally settled until *Read* v. *Brookman* (1789) 3 T. R. 151, *per Grose,* J., p. 161. See *Toulmin* v. *Price* (1800) 5 Ves. 235, 238.

"Until a recent period, there could be no remedy on a lost bond in a Court of Common Law, because there could be no *profert* of the instrument, without which the declaration would be defective. At present the Courts of law do entertain the jurisdiction, and dispense with the *profert,* if an allegation of loss by time and accident is stated in the declaration. 1 Story, Eq. Jur. §181; *Read* v. *Brookman,* 3 T. R. 151; *Totty* v. *Nesbit,* 3 T. R. 153; 1 Chitty, Pl. (9th Am. ed.) 365, 366; *Cutts* v. *U. S.,* 1 Gallis. 69; *Powers* v. *Ware,* 3 Pick. 451; *Smith* v. *Emery,* 7 Halst. 53; *Recs* v. *Overbaugh,* 6 Cowen 748, 749; *Kelly* v. *Riggs,* 2 Root 126; *Hinsdale* v. *Mills,* 5 Conn. 331."—Summer's note to Ex parte Greenway (1802) 6 Ves. 812.

In *Bromley* v. *Holland* (1802) 7 Ves. 3, Lord Eldon discusses and criticises the exercise of such jurisdiction by courts of law.

KEMP *v.* PRYOR (1802), 7 *Vesey, Jr.*, 237, 249.—LORD CHANCELLOR (ELDON).— * * * Farther, I cannot admit, that if the subject would have been a subject of equitable demand previously to the extension of the exercise of the principle, upon which a Court of Law is authorized to act in the action for money had and received, that Court sustaining an action, they would not have sustained forty years ago, is an answer to a bill, that would have been sustained in this Court at that time. Upon what principle can it be said, the ancient jurisdiction of this Court is destroyed, because Courts of Law now, very properly perhaps, exercise that jurisdiction, which they did not exercise forty years ago? Demands have been frequently recovered in Equity, which now could be without difficulty recovered at Law; as in the cases in the Exchequer upon policies of insurance; and others, in which you may recover money, that the policy of the law would not permit to be paid: as payments upon a marriage brocage contract. If a bill was filed for such a purpose, and requiring a commission, it could not be met by demurrer or otherwise with the objection, that the Plaintiff might obtain the relief at Law; and the Court of Law could by imparlances give the benefit of a commission, which this Court had been in the habit of giving. I cannot hold, that the jurisdiction is gone, merely because the Courts of Law have exercised an equitable jurisdiction, more especially in the action for money had and received. I agree, that, where money could only be recovered at Law, the prayer for a commission will have no other operation in this Court than the mere consideration of the question of jurisdiction, as founded upon the simple fact, that a commissiou is prayed, would give it.[1]

SWEENY *v.* WILLIAMS.

IN THE COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1883.

[36 *New Jersey Equity* 627.]

The opinion of the court was delivered by

MAGIE, J.

The bill filed in this case prayed for a perpetual injunction restraining the respondent, as receiver of the Mechanics and Laborers Savings

[1] In a later case, *Eyre* v. *Everett* (1826), 2 Russ. 331, 332, Lord Eldon said: "There are some cases in which the Court entertains jurisdiction, though there would be a good defence at law; but that is, because the matter was of such a kind that there was an original jurisdiction belonging to this Court; and this court will not allow itself to be ousted of any part of its original jurisdiction, because a court of law happens to have fallen in love with the same or a similar jurisdiction, and has attempted (the attempt for the most part is not very successful) to administer such relief as originally to be had here and here only."

Bank, the said bank and one John Halliard, from bringing or maintaining any action against the appellant, who was the complainant, upon a certain bond and mortgage. The bond was dated November 1st, 1876; was made by appellant to said Halliard and was conditioned for the payment of $10,000 on November 1st, 1879, with interest, and was secured by the mortgage, which was likewise made by appellant to Halliard, on lands which Halliard had simultaneously conveyed to him, and recited that it secured a part of the purchase-money. The bond and mortgage had been assigned by Halliard to said bank. These facts were averred in the bill, and appellant therein stated, as grounds for the relief prayed, that the transaction between Halliard and himself was merely nominal and that no real interest was acquired by him in the lands conveyed to him, and no consideration existed for the bond and mortgage. It was also averred that an action had been lately before brought by respondent, as receiver, in the supreme court, against appellant, upon the bond. An injunction against proceeding in said action pending the suit in equity was also prayed.

Upon the advice of Vice-Chancellor Van Fleet, the bill was dismissed, and this appeal was taken.

In the opinion of the vice-chancellor it is intimated that the court of chancery might have properly declined jurisdiction in the case, on the ground that the relief claimed was available to the complainant as a defence to the action at law, and that nothing appeared to afford a reason for changing the forum of litigation. This intimation has been considered by counsel arguing before us as implying a doubt as to the jurisdiction of courts of equity in cases where the relief formerly afforded by those courts alone, may now by statute be afforded by courts of law. I do not understand the opinion as implying such a doubt, but if it is susceptible of that construction, it is in that respect erroneous.

When courts of law have of their own motion extended their jurisdiction over cases theretofore solely cognizable in equity, the jurisdiction of the latter courts has been in no respect abridged, although when the jurisdiction at law has become well established, the equity jurisdiction has been in some cases declined. *Eyre* v. *Everett,* 2 *Russ.* 381; *Kemp* v. *Byor,* 7 *Ves.* 237; *Bromley* v. *Holland, Id.* 5; *Wells* v. *Pierce,* 27 *N. H.* 503; 2 *Spen. Eq. Jur.* § 693. When, by statute, a right to administer relief previously administered only by courts of equity is extended to courts of law, the jurisdiction of the courts of equity is undisturbed, unless prohibitory or restrictive words are used in the statute; thenceforth the jurisdictions are concurrent. This was the view expressed by Chancellor Green, in *Irick* v. *Black,* 2 *C. E. Gr.* 189, 199, and by Chancellor Zabriskie, in *Shotwell* v. *Smith,* 5 *C. E. Gr.* 79. Although questioned in the cases of *McGough* v. *Ins. Bank,* 2 *Ga.* 151, and *Riopelle* v. *Doellner,* 26 *Mich.* 102, the proposition is sustained by a great weight of authority. *Atty.-Gen.* v. *Aspinall,* 2 *M.* & *C.* 613; *Cannon* v. *McNab,* 48

Ala. 99; *Millsaps* v. *Pfeiffer,* 44 *Miss.* 805; *Case* v. *Fishback,* 10 *B. Mon.* 40; *Hall* v. *Hall,* 43 *Ala.* 488; *Wesley Church* v. *Moore,* 10 *Pa. St.* 273; *Bright* v. *Newland,* 4 *Sneed* 440; *King* v. *Payan,* 18 *Ark.* 583; *People* v. *Houghtaling,* 7 *Cal.* 348; *Crain* v. *Barnes,* 1 *Md. Ch.* 151; *Payne* v. *Bullard,* 23 *Miss.* 88; *Mitchell* v. *Otey, Id.* 236; *Clark* v. *Henry,* 9 *Mo.* 339; *Dobyns* v. *McGovern,* 15 *Mo.* 662.

But if there exists a concurrent jurisdiction in courts of law and courts of equity, the latter will decline to entertain jurisdiction after the jurisdiction of the courts of law has attached, unless the relief that the applying party is entitled to ask cannot be fully obtained in the court of law. *Story's Eq. Jur.* § 599; *Smith* v. *Smith's Admr.,* 3 *Stew. Eq.* 564; *Salter* v. *Williamson,* 1 *Gr. Ch.* 480; *Van Mater* v. *Sickler,* 1 *Stock.* 483; *Clarke* v. *Johnston,* 2 *Stock.* 287.

It is this proposition that I understand the learned vice-chancellor to have maintained in the opinion below. But I do not think the proposition was applied by him to this case, nor is it, in my judgment, properly applicable thereto. The complainant was entitled, if at all, to a relief broader than could be afforded him in the action at law. He asked, and if his contention is correct, was entitled to a perpetual injunction against the bond. At law, his relief as to the bond could be obtained only in case the plaintiff brought his action to trial. If he discontinued or submitted to a nonsuit, the relief could not be obtained there. The complainant was also entitled to relief on the whole transaction, including the mortgage securing the bond, a relief which would only be incidentally rendered by a successful defence at law, and to which Halliard was necessarily to be a party. Adequate relief was therefore not provided in the existing action at law. I think it indisputable that the court below had jurisdiction and a right to adjudicate on the merits of the case, as was done.[1]

In Year Book, 4 Hen. 7, 4 b (1489) Archbishop MORTON, Lord Chancellor said:

It is against reason that one executor should have all the goods, and give a release by himself. I know very well that every law should be consistent with the law of God; and that law forbids that an executor should indulge any disposition he may have to waste the goods of the testator; and if he does, and does not make amends, if he is able, he shall be damned in hell.[2]

[1] Only a part of the opinion is printed.

[2] In Year Book, 13 Edw. IV. fol. 9, case 5, the chancellor said the case must be determined by the law of nature. In Calvin's case, 7 Co. 12 b. this law is thus defined:

"The law of nature is that, which God at the time of creation of the nature of man infused into his heart, for his preservation and direction and this is *lex aeterna* the moral law, called also the law of nature."

In commenting upon Archbishop Morton's case, Lord CAMPBELL observes: "Equity decisions at this time depended upon each chancellor's particular

In the Earl of OXFORD's case (1616) 1 Ch. Rep. 1, 4, Lord Chancellor ELLESMERE said:

By the Law of God, He that builds a House ought to dwell in it; and he that plants a Vineyard ought to gather the Grapes thereof; and it was a Curse upon the Wicked, that *they should build Houses and not dwell in them, and plant Vineyards and not gather the Grapes thereof.* Deut. 28. v. 30.

MYNN *v.* COBB.

IN CHANCERY, BEFORE LORD CHANCELLOR ELLESMERE, 1603.

[*Cary* 35.]

Nota in la case *Mynn* v. *Cobb,* the trust was not so fully proved as the Lord Chancellor would make a full decree thereupon, so as it should be a precedent for other causes, and yet so far proved, as it satisfied him as a private man; and therefore in this case he thought fit to write his letters to the defendant to conform himself to reason; and affirmed, that if he should find the defendant obstinate, then would he rule this cause specially against the defendant, sans la tires consequence.[1]

notions of the law of God and the manner in which heaven would visit the defendant for the acts complained of in the bill; and though a rule is sometimes laid down as to where 'a subpœna will lie,' that is to say, where there might be relief in chancery, it was not until long after that, authorities were cited by chancellors, or that there was any stated reference by them to the doctrine of the court." (1 Lives of the Lord Chancellors, ch. XXVI).

[1] "The court would not charge the lands with said money, the example being dangerous." *Manwayring* v. *Dudley* (1601-2) *Tothill* 119.

In the culminating and final struggle between law and equity represented respectively by Cole and Bacon, Lord Chancellor Ellesmere was the dominant and deciding influence in 1616 that assured the permanent triumph of Chancery.

His exercise of the right to restrain an unconscientious judgment at law was so frequent that when he was created Viscount Brackley the wits of Westminster Hall not inappropriately dubbed him Viscount Break-law.

Ellesmere cuts a great figure in equity and he is not improperly considered a founder if not "the earliest founder of our system of equity" (Campbell's Lives of the Chancellors, Ch. XLV.).

FREEMAN *v.* GOODHAM.

IN CHANCERY, BEFORE LORD CHANCELLOR NOTTINGHAM, 1676.

[1 *Cases in Chancery* 295.]

The wife when sole, bought goods for money, and after married, and died. The goods came to the husband's hands after her death, but the debt remained unpaid.

The bill by the plaintiff, the creditor, was to discover the goods, and a demurrer thereto, which was over-ruled by the Lord Chancellor, who with some earnestness said he would change the law in that point.[1]

FRY *v.* PORTER (1670), 1 *Mod.* 300, 307.—KELYNGE, *Chief Justice.* I do not see how an averment or proof can be received to make out a man's intention against the words of the will. In *Vernon's Case,* though it were a case of as much equity as could be, it was denied to be received: and so in my Lord *Cheney's Case.* Here was a case of Sir *Thomas Hatton,* somewhat like this case, wherein no relief could be had.

VAUGHAN, *Chief Justice.* I wonder to hear of citing of precedents in matter of equity. For if there be equity in a case, that equity is an universal truth, and there can be no precedent in it. So that in any precedent that can be produced if it be the same with this case, the reason and equity is the same in itself. And if the precedent be not the same case with this, it is not to be cited, being not to that purpose.

[1] In 1682, at the Easter Term, Lord Nottingham said: "The common law relieves not particular cases against the general rule, but in chancery every particular case stands on its own particular circumstances; and though in general the law will not relieve, yet equity doth, so as the example introduce not a general mischief." *Hele* v. *Hele* (1682) 2 *Cas. in Ch.* 87, 93.

Lord Talbot, with the principal case before him, said: "If the law as it now stands be thought inconvenient, it will be a good reason for the Legislature to alter it, but till that is done, what is law at present, must take place." *Heard* v. *Stamford* (1735) 3 *Peere Williams* 409, 411, (*infra*).

"Equity is a Rougish thing, for law we have a measure, know what to trust to, Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure we call [a Foot] a Chancellor's foot, what an uncertain measure this would be? One Chancellor has a long Foot, another a short Foot, a Third an indifferent Foot; 'Tis the same thing in the Chancellor's Conscience."—*Selden, Table Talk, tit. Equity.*

Spence remarks,—"Selden better than any man living knew what equity really was"—1 *Spence Jurisdiction of the Court of Chancery* 414, *n.* (*a*).

BRIDGMAN, *Lord Keeper.*[1] Certainly precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us; and besides the authority of them who made them is much to be regarded. We shall suppose they did it upon great consideration, and weighing of the matter; and it would be very strange, and very ill, if we should disturb and set aside what has been the course for a long series of time and ages.

Thereupon it was ordered that they should attend with precedents, and then, they said, they would give their opinions.[2]

[1] Of Lord Keeper Bridgman, greater as Chief Justice than Chancellor, Lord Nottingham is reported to have said: "It is due to the memory of so great a man, whenever we speak of him, to mention him with reverence and with veneration for his learning and integrity." And Lord Ellenborough, not over-given to compliments, pronounced him "a most eminent judge, distinguished by the profundity of his learning and the extent of his industry."

[2] As early as 1595-6 the case of *Mears* v. *St. John* appears to have been decided upon the strength of a *precedent* cited from 34 Henry 6, by Sir Thomas Egerton, Master of the Rolls (afterwards Lord Ellesmere). See 4 Co. Inst. 86.

"A court of equity is as much bound by positive rules and general maxims concerning property (though the reason of them may now have ceased) as a court of law is."—*Per Lord Mansfield, in Doe* v. *Laming* (1760) 2 *Burr.* 1100, 1108.

"Some judges, when they seem doubtful what to determine in a cause, will be inquisitive after precedents; which I cannot conceive to what purpose it should be, unless that being desirous to pleasure a friend, and the matter being of that nature that they are ashamed to do it, they would faine know, whether any before them have done so ill as they intend to do. For do they think, that if any other have done the like, it is sufficient warrant for them therefore? Surely noe! But every judge, taking upon him that weighty calling ought to direct his orders *secundum allegata et probata*, and according to the rules of a good conscience, guided by the word of God, and upon certaine knowledge of the lawes of the realm, agreeable thereunto; and soe to divide between lawe and equity, that for the particular of any private person no violence be offered to the lawe; and not to be led like a bear by the nose after other men's examples, which, if it were admitted, there is no injustice, however gross and palpable soever, but might by these means easily be excused." Hargrave's Law Tracts 446—["From the contents it (the mss.) appears to have been composed in the latter end of the reign of James the first, soon after the fall of Lord Bacon and the promotion of Bishop Williams to the great seal."—Introductory note.].

"The mention of this most liberal description of equitable jurisdiction, the *arbitrium boni viri* puts me in mind to say a few words upon another question very properly stated by you. Whether a court of equity ought to be governed by any general rules?

"It is impossible to answer this question in a satisfactory manner without running into several distinctions.

"Some general rules there ought to be, for otherwise the great inconvenience of *Jus vagum et incertum* will follow; and yet the Praetor must not be so absolutely and invariably bound by them, as the judges are by the rules of the

MANNING *v.* MANNING (1815), 1 *Johns. Ch.* 527, 529.—THE CHANCELLOR [KENT]. The claim of [an executor to] an allowance has been pressed upon the court with much zeal, as if the denial of it would be extremely unjust, and as if this court was at liberty to deal with established rules just as it pleased. This very point was one that arose in the case of *Green* v. *Winter;* and it was, then, considered as a settled rule in the *English* chancery, that no such allowance was admissible, unless it rested upon contract, or was given by the will. The rule there must be the rule here; for I take this occasion to observe, that I consider myself bound by those principles, which were known and established as law in the courts of equity in *England,* at the time of the institution of this court; and I shall certainly not presume to strike into any new path, with visionary schemes of innovation and improvement; *via antiqua via est tuta.* It would, no doubt, be, at times, very convenient, and, perhaps, a cover for ignorance, or indolence, or prejudice, to disregard all *English* decisions as of no authority, and to set up as a standard my own notions of right and wrong. But I can do no such thing. I am called to the severer and more humble duty of laborious examination and study. It was Lord *Bacon* who laid it down as the duty of a judge to draw his learning from books, and not from his own head. This court ought to be as much bound as a court of law, by a course of decisions applicable to the case, and establishing a rule. As early as the time of Lord Keeper *Bridgman,* it was held that precedents were of authority; and that it would be "very strange and very ill" to disturb a rule in chancery which had been settled. (1 *Mod.* 307.) The system of equity principles, which has grown up and become matured in *England,* and chiefly since Lord *Nottingham* was appointed to the custody of the great seal, is a scientific system, being the result of the reason and labours of learned men for a succession of ages.[1] It contains the most en-

common law; for if they were so bound, the consequence would follow which you very judiciously state, that he must sometimes pronounce decrees, *which would be materially unjust since no rule can be equally just in the application to a whole class of cases, that are far from being the same in every circumstance.*

"This might lay a foundation for an equitable relief even against decrees in equity, and create a kind of superfoetation of courts of equity."—*Letter from Lord Hardwicke to Lord Kames,* 1750. *Parkes' History of Chancery* 501, 506.

[1] The language of eulogy has been exhausted in the attempt to do justice to a man who kept his hands clean as befits Equity and served the Stuarts and the cause of justice with equal success. Of the many tributes but two are cited. Lord Henley considered him "very great in the knowledge of law and *Equity*" (*Burgess* v. *Wheate* (1759) 1 Eden 249), and in *Kemp* v. *Kemp* (1801) 5 *Ves.* 858, Sir R. P. Arden, M. R. spoke of him as "that great Judge Lord Nottingham, styled the Father of Equity." If the father be judged by the offspring, Nottingham's fame is coextensive with the system of Equity which he expounded scientifically, if he did not really create.

larged and liberal views of justice, with a mixture of positive and technical rules, founded in public policy, and indispensable in every municipal code. It is the duty of this court to apply the principles of this system to individual cases, as they may arise; and, by this means, endeavour to transplant and incorporate all that is applicable in that system into the body of our own judicial annals, by a series of decisions at home.

The Master of the Rolls, Sir *Joseph Jekyll*,[1] disclaimed any discretionary power in the court, sometimes ignorantly imputed to it, to follow the private affections, or any arbitrary notions of abstract justice, instead of the established maxims of law and equity. Though proceedings in equity are said to be *secundum discretionem boni viri*, yet, when it is asked, *Vir bonus est quis?* The answer is *Qui consulta Patrum, qui Leges, Juraque servat;* (Sir *J. Jekyll*, in 2 *P. Wms.* 753. See also 3 *P. Wms.* 411;) and it may be laid down as a certain truth, that the *English* system of equity jurisprudence forms an important and very essential branch of that "common law," which was recognised in the constitution of this state. If it were not so, this court would be a dangerous tribunal, with undefined discretion, and without either science or authority to guide it. The *English* decisions are, undoubtedly, the most authentic evidence of the *English* common law; and the dignity or independence of our courts is no more affected by adopting these decisions, than in adopting the *English* language; or than the independence of *France* or *Holland* is wounded by following, as they do, the civil code of the ancient *Romans*.

Our business, then, as questions arise, is to discover what rule, if any, has been established by the courts in this state, and if none, then what was the existing rule in the *English* system of equity at the commencement of our revolution. And while engaged in this inquiry, we are not to blind our eyes against human knowledge, but it is incumbent on us to examine the several authorities, whether they be ancient or modern, whether they be before or since the revolution, whether they be foreign or domestic, which may tend in any degree to ascertain, explain, or illustrate, the point under consideration. When we have been able to deduce from them, with sufficient precision, the true, genuine rule of equity, that rule becomes the law of the case, and the case a precedent for the future.[2]

[1] In *Milbourne* v. *Milbourne* (1786) 1 *Cox* 248, Sir Lloyd Kenyon, M. R. took occasion to refer to Lord Talbot and Sir Joseph Jekyll, whom he justly termed "both men of consummate knowledge."

[2] "Whatever may be called a legislative authority in this court, I utterly disclaim; but so far as the court have already gone in cases, so far as Lord *Nottingham*, Lord *Cowper*, Lord *King*, and Lord *Talbot* have gone in the several cases before them, I think myself under an indispensable obligation of following.

"I have spent so much time *principally* with this view, that the work of this

GEE *v.* PRITCHARD.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1818.

[2 *Swanston* 402.]

The bill charged that Pritchard was proceeding to print and publish, or cause to be printed and published, the letters of the plaintiff, or true copies or copy thereof, and extracts therefrom, and that he and the defendant Anderson had caused public notice thereof to be given, by advertisement in the newspapers, and otherwise, and particularly in a newspaper called *The Morning Post,* on Friday, the 9th of July, in the words following: "In the press, and speedily will be published by William Anderson, bookseller, Piccadilly, 'The Adopted Son; or, Twenty Years at Beddington,' containing Memoirs

day may not be misunderstood, as if the court had departed from their former precedents." Per Lord Hardwicke, in *Chesterfield* v. *Janssen* (1750) 1 *Atk.* 339, 353.

In *Bond* v. *Hopkins* (1802) 1 Sch. & Lef. 428, 429, Lord *Redesdale* observed, "There are certain principles on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles; but the principles are as fixed and certain as the principles on which the courts of common law proceed."

It is of interest to note that Mr. Justice Story, in quoting and relying upon this decision of Lord Redesdale terms him "one of the ablest judges that ever sat in equity." (1 *Equity Jurisprudence* § 20). From this opinion one would needs be bold indeed to dissent.

"The correctness of this principle is abundantly established by the authorities cited in the opinion delivered by this court in the action at law, and its application to the case most forcibly and conclusively illustrated; that it cannot be less operative in a court of equity than in a court of law is obvious. The same rules of decision govern both courts; the former cannot any more than the latter decide in opposition to legal principles, in a case to which these principles are applicable: to do so would be an assumption of an arbitrary discretion, as pernicious to the best interest of the community, as it is contrary to the fundamental principles of our government. Even those rules of law which in their nature are technical and positive, cannot be disregarded by a court of equity." *Per Boyle, Ch. J., in Marshall* v. *Craig* (1812) 1 *Bibb* (*Ky.*) 394, 395.

"I now come to a modern case decided in the year 1866, and it is the first time I find any Judge stating that there was any law to prohibit such a will being carried into effect. Having examined, not only the authorities I have mentioned, but some others to which I have been referred, and have

of a Clergyman, written by himself, and interspersed with interesting correspondence"; and that Anderson was printing and about to publish the same, or some work in which the letters, or copies thereof, or extracts therefrom, were introduced.

The bill also charged, that the plaintiff never consented or agreed that the letters, or any of them, or any extracts or extract therefrom, should be published.

The bill prayed that the defendants might be respectively restrained by injunctions from printing or publishing the original letters, or any copies or copy of the original letters, so written by the plaintiff, or any extracts or extract therefrom, and might be decreed to deliver up to the plaintiff, or to destroy, the original copy of the letters so taken or made by the defendant Pritchard, and all printed and other copies thereof, or of any extracts therefrom, which they might respectively have in their possession or power.

The allegations of the bill being verified by affidavit, a motion was made for an injunction, which the Lord Chancellor, after inquiring for an instance of an injunction issued against the person to whom the letters were addressed, granted on the authority of Thompson *v.* Stanhope.—*Amb.* 737.[1]

Mr. Hart, Mr. Wetherell, and *Mr. Sidebottom,* in support of the motion to dissolve the injunction.

found myself, I may say, I cannot find a trace of it before the case I am about to mention, and therefore if there is such a law it must have been made in the year 1866. Now it could only have been made in the year 1866 by statute, because in the year 1866, Equity Judges did not profess to make new law, and when they state what the law is, they do not mean as might have been said two or three centuries before, that that was law which they thought ought to be law."—*Per Sir George Jessel, M. R., in Johnson* v. *Crook* (1879) *L. R.* 12 *Ch. Div.* 639, 649.

"I intentionally say modern rules, because it must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these: the separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the Chancellors who first invented them, and state the date when they were first introduced into Equity jurisprudence; and, therefore, in cases of this kind, the older precedents in Equity are of very little value. The doctrines are progressive, refined, and improved; and if we want to know what the rules of Equity are we must look, of course, rather to the more modern than the more ancient cases."—*Per Sir George Jessel, M. R., In re Hallett's Estate* (1879) 13 *Ch. Div.* 696, 710.

[1] Only a part of the statement of the case and the pleadings is given.

The Lord Chancellor.[1] It will not be necessary to trouble you with that view of the case. The publication of a libel is a crime; and I have no jurisdiction to prevent the commission of crimes; excepting, of course, such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime—an exception arising from that peculiar jurisdiction of this court.

Argument in support of the motion resumed.

An attempt will be made to sustain the injunction, on the ground that the publication of the letters will be painful to the feelings of the plaintiff.

The Lord Chancellor. I will relieve you also from that argument. The question will be, whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of that friendship affords a reason for the interference of the court.

Argument in support of the motion resumed.

The injunction then must rest on one of two grounds: 1. That the plaintiff possesses, in the letters, a property either general or literary; 2. That the publication of them is a breach of trust.

It will be difficult to establish, that letters may be the subject of literary property. The cases of Pope *v.* Curl, 2 *Atk.* 342, and Thompson *v.* Stanhope, *Amb.* 737, render it doubtful to what extent the court recognizes the doctrine of property in letters. Thus Pliny's letters are said to have been written or revised for publication, *Plin. Episi. l.* 1, *ep.* 1.

The Lord Chancellor. My predecessors did not inquire whether the intention of the writer was or was not directed to publication. The difficulty which I have felt in all these cases is this: If I had written a letter on the subject of an individual, for whom both the person to whom I wrote and myself had a common regard, and the question arose for the first time, I should have found it difficult to satisfy my mind that there is a property in the letter; but it is my duty to submit my judgment to the authority of those who have gone before me; and it will not be easy to remove the weight of the decisions of Lord Hardwicke and Lord Apsley. The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case.

[1] In thinking of English Chancery the name of Eldon at once occurs and his name has, to use a phrase of Lowell's, "grown smooth as honey on the lips of man."

The judgments of Sir Thomas Plumer are far from impeccable but he was happily inspired when he termed his chief "the greatest judge in this country." (*Copis* v. *Middleton* (1817) 2 *Madd.* 433). The student is referred to the life of Lord Eldon, in 3 volumes, by Horace Twiss.

I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.

I understand the Vice-Chancellor in the case of Lord and Lady Perceval *v.* Phipps, 2 *Ves. & Beam.* 19, not to have denied Lady Perceval's property in the letters, but to have inferred, from the circumstances, that she had authorized, and for that reason could not complain of, the publication.

Argument in support of the motion resumed.

Letters between public functionaries on public business, or between private individuals on private business, where the nature of the subject discussed made it evident that the correspondence could not be designed for publication, may constitute an exception.

The LORD CHANCELLOR. Are the cases which establish the jurisdiction founded in a right to restore the property, or to restrain the publication? I think that the decisions represent the property as qualified in some respects; that by sending the letter, the writer had given, for the purpose of reading, and, in some cases, of keeping it, a property to the person to whom the letter was addressed, yet, that the gift was so restrained, that *ultra* the purposes for which the letter was sent, the property was in the sender. If that is the principle, it is immaterial whether the publication is for the purpose of profit or not. If for profit, the party is then selling; if not for profit, he is giving, that, a portion of which belongs to the writer. I doubt whether the court has proceeded so far as to decree the restoration of letters; for the principle on which it interferes recognizes a joint property in the writer and the person to whom they are addressed.

Argument in support of the motion resumed.

It is clear that the defendant was entitled to retain the letters, and retaining, to read and show them to his friends or to strangers. These modes of publication there is no pretence for restraining: upon what principle then can the publication by printing be restrained? An equity, or *jus proprietatis*, in the plaintiff, must apply equally to every mode of publication, and, confessedly, not authorizing the restraint of some modes, cannot by any rational distinction authorize the restraint of any mode. The argument is the same, whether the supposed right of the plaintiff is founded in property or breach of confidence.

The LORD CHANCELLOR. Does the common injunction ever go so far? When the court enjoins a defendant from publishing the book of another, has it ever restrained him from reading it, or showing it to his friends? Such an injunction will not prevent the defendant from carrying the book to a reading-room, or reciting it in public company;[1]

[1] Acting a dramatic composition on the stage, is not a publication, within

but is that a reason for not restraining publication? The usage limits the extent of the jurisdiction.

Argument in support of the motion resumed.

Admitting that the right of property in the persons receiving the letter is qualified, the question whether that right of property includes a right of publication must depend on the circumstances of each case. Whenever the writer is entitled to the restoration of the letter, the party from whom he is entitled to recover it can have no right of publication. The exclusive property in the manuscript includes every right of using it, and, among other uses, for the purpose of publication. But where the correspondent is entitled to retain the manuscript, great difficulty occurs in restricting his right of publication.

In this case the defendant was unquestionably entitled to retain the letters; and he is now entitled to publish them for the vindication of his character. The cases of Pope *v.* Curl, and Thompson *v.* Stanhope, proceed, on the supposition, that the person in possession of the letters was the depositary only, and not the proprietor; but whenever the person to whom they are sent is entitled to retain them, being proprietor of the substance on which they are written, he is proprietor of their contents, and may therefore publish them. The injunction in —— *v.* Eaton, 13 April, 1813, 2 Ves. & Beam. 23, 27, was granted on the fact of purchase of the letters by the writer from the defendant.

On the ground of breach of trust, of which there is no evidence, the injunction could not be maintained; this court interferes with publications only as the subject of property—Southey *v.* Sherwood, 2 Mer. 435. The injunction in the Earl of Granard *v.* Dunkin, 1 Ball & Beat. 207, was founded on a right of property in the receiver of the letters.

The Lord Chancellor. The question is, what is the conduct of the plaintiff, which, by the defendant's affidavit, is represented as his justification in the publication of the letters? If the court possesses jurisdiction by reason of a right of property, and if the principle of the decision in Lord and Lady Perceval *v.* Phipps would require me to declare, that, notwithstanding that right of property, the plaintiff's conduct had been such, that she was not entitled to the interference of the court, the defendant is at liberty to insist on either or both of those points; provided that he is not concluded by the act which Lord Apsley so strongly censured, of returning the originals and retaining copies. That act is particularly stated in the bill as an abandonment of property. If the defendant had any right of property, it was in the originals. He has not averred that the letters will prove the statement in his affidavit, though that is to be inferred. The defend-

stat. 8 Ann. c. 19; but injunctions have been granted to restrain acting as an invasion of copyright. Morris *v.* Kelly, 1 Jac. & Walk. 481.

ant might destroy the letters,[1] and so destroy the plaintiff's expectation of profit from them.

Sir Samuel Romilly[2] and *Mr. Roupell* for the injunction.

It has been decided, fortunately for the welfare of society, that the writer of letters, though written without any purpose of profit, or any idea of literary property, possesses such a right of property in them, that they cannot be published without his consent, unless the purposes of justice, civil or criminal, require the publication.[3] It is not necessary that they should be written for profit: Dr. Paley having prepared sermons designed for gratuitous distribution among his parishioners, the court held that his executors possessed a property in them, and, at their instance, interfered to restrain the publication by a bookseller. The question here is, whether the defendant has established that he is about to publish these letters for purposes essential to justice? Without that proof he cannot avail himself of the decision in Lord and Lady Perceval *v.* Phipps, a decision which admits much remark. No such case is established by his affidavit, and for the purpose of establishing one, a course more effectual than any affidavit would have been the production of the intended publication. The publication, not of a simple narrative of facts, but of a novel, is an extraordinary expedient for the vindication of character.

The Lord Chancellor. The decision of the Vice-Chancellor proceeded on the principle, that in that case the publication was necessary for the purposes of justice; the letter of the defendant, written in April, is decisive, that the publication here is not necessary for those purposes. What occasion was there for the defendant to inform the public, that he intended certain papers for distribution among his private friends?

Argument for the injunction resumed.

The present decision will constitute a most important precedent.

[1] See Wooddson Lectures, 415.—Reporter's note.

[2] Inasmuch as Sir Samuel Romilly (not to be confused with his eminently respectable son, Sir John, Master of the Rolls) is generally considered as the type, and model of man and lawyer, the editor cannot omit the opportunity of this passing mention, to refer to the delightful Life and Letters of Sir Samuel edited by his sons.

The reference is all the more appropriate inasmuch as the doctrine of the principal case is often credited directly to Sir Samuel rather than to Lord Eldon

[3] "At etiam literas quas me sibi misisse diceret, recitavit, homo et humanitatis expers, et vitæ communis ignarus. Quis enim unquam, qui paululùm modo bonorum consuetudinem nosset, literas ad se ab amico missas, offensione aliqua interposita, in medium protulit, palàmque recitavit? Quid est aliud tollere à vita vitæ societatem, quam tollere amicorum colloquia absentium? Quàm multa joca solent esse in epistolis, quæ prolata si sint, inepta esse videantur? Quam multa seria, neque tamen ullo modo divulganda?" Cic. Phil ii.—Reporter's note.

If, on these affidavits, the injunction is dissolved, no man can be restrained from publishing the letters which he has received from another; all that will be necessary to authorize the publication is a quarrel, an assertion, that the disclosure is required for the vindication of his character. When the defendant returned the originals, clandestinely retaining copies, he abandoned all right of property in the letters.

The LORD CHANCELLOR. This case came originally before me on a motion made *ex parte* by the plaintiff Mrs. Gee, the widow of the father of the defendant, who is represented in the pleadings as his illegitimate son. The affidavit of the defendant states his introduction in that character; that he was known and received as a son, and treated by his father and his wife with great kindness; the affidavit seems to intimate some dissatisfaction with the representation made in the bill, of the circumstances of his introduction; that is, perhaps, not very material, not a matter which much blends itself with the consideration that I must give to the subject; but his introduction is certainly represented differently in the bill and in his affidavit. It is stated, that the plaintiff entertained a great kindness for him, and that she expressed that kindness by letters in the life of his father. I collect from the last affidavit, that Mr. Gee gave to the defendant a legacy of £4,000; the interest, for life, of £6,000, devoting the principle of that sum for the benefit of his children; and that he gave to the plaintiff the interest of £17,000 for her life, with a power which, under the circumstances, appears to me not unfit, to appoint that sum, not by deed merely, but by deed or will; and I am bound to take it to be his pleasure, that she should have the power, during the whole course of her life, of judging to whom, at her death, it should devolve; an absolute power, of the exercise of which no person has any right to complain. The testator also declares, that if his widow does not think proper to make a different disposition, that sum shall go to the defendant; but as, between the defendant and the plaintiff, the rule by which I am governed, is the will of his father. I understand that it was the intention, that he should have the living which he now has, which was in the gift of Mr. Gee's brother, but not vacant at his death; the plaintiff contends, that she in some sense obtained it for him; it is not going far to conjecture, that if she had opposed, it would not have been given to him. The defendant had thus received £4,000 from his father's bounty, and the interest of £6,000, and had this contingent right in £17,000, with the prospect of the rectory.

The plaintiff represents, that during many years she had addressed to the defendant letters of a private and confidential nature; that she afterwards had reason to be dissatisfied with his conduct, and they had ceased to be on terms of friendship; and as evidence of his intention to publish the letters, her affidavit states the advertisement. The defendant represents, that he neither did nor does intend to publish the letters for profit; and insists, that it is too hard a criticism to

infer from the words, "to publish," after this explanation, that he must be understood to mean publication for sale; and yet I cannot but think, that the defendant will, on reflection, admit, that if it was his intention merely to give these letters to his friends and relations, it was not prudent to announce his intention by advertisement. The advertisement thus held out to the public, though of a publication intended only for private circulation, has this effect, that those who see the publication know its nature, but those who saw only the advertisement, might have been led to believe, that there was something in the letters more to the disadvantage of those concerned, than they really contained; and I cannot think this a prudent course.

It has been said that the bill contains no allegation of a right of property; but there is an express charge, that by returning the originals, the defendant Pritchard abandoned any right of property which he might have had in the letters. The defendant Anderson has not filed any answer or affidavit; but I am bound, by the affidavit of the defendant Pritchard, to believe that he did not intend to publish the letters for sale.

With reference to charges of wounding feelings, looking at the jurisdiction of the court to be, if not entirely, mainly, relative to the question, whether the plaintiff has or has not, property, I shall trouble myself no farther than by simply stating the circumstances of the case as they appear in the affidavits; if they prove a breach of trust, a violation of a pledge which has been given to the plaintiff, concerning these letters, that is not the ground on which I profess to proceed; but it is necessary to refer to this for the purpose of pointing out the extreme difference between this case and the case of Lord and Lady Perceval *v.* Phipps.

The argument of Mr. Wetherell has confirmed doubts which have often passed in my mind relative to the jurisdiction of this court over the publication of letters; but I profess this principle, that if I find doctrines settled for forty years together, I will not unsettle them. I have the opinion of Lord Hardwicke and of Lord Apsley, pronounced in cases of this nature, which I am unable to distinguish from the present. Those opinions have been acquiesced in without application to a higher court. If I am to be called to lend my assistance to unsettle them, on any doubts which I may entertain, I will lend it only when the parties bring them into question before the House of Lords.

The statement of the defendant's affidavit I take to be true, as I must have taken his answer. I cannot trust myself with any such question, as whether Mr. Gee should have left to him a larger fortune; what were the expectations that he might form in consequence of what passed between him and his father, is a point on which I cannot enter. The provision made by the will is that which this court is bound to say, as between the father and the son, must be considered proper. The defendant may most honestly entertain an opinion that

more was intended; but when I see such a power given to the widow, I must understand that his father meant that, to the time of her death, her will should be free.

Supposing the affidavit of the defendant to have stated, with a great deal more precision, the representations which seem to him to call in question his veracity, and in consequence of which he is under a belief that it becomes him to set himself right in the opinion of the world, the plaintiff's representations, that the defendant's marriage was disapproved by herself and her husband, and so as to all the rest; it would have been a more welcome duty to have considered, first, Whether the court has jurisdiction on this subject; secondly, Whether the motives which the defendant states to have led to this publication were so created by the plaintiff's conduct, that I ought to follow the example of the Vice-Chancellor in Lord and Lady Perceval *v.* Phipps, and to say, that, let it be ever so clear that the plaintiff has either a sole or a joint property in the letters, the court will not interfere between the parties; but the affidavits state a transaction with regard to the letters, with no part of which am I acquained, except what appears in the affidavits. Repeating that the testator had left £17,000 to the discretion of the plaintiff, that she had given to the defendant £4,000 since the testator's death, and had, at least in her own judgment, been instrumental in obtaining the living which he now holds, her affidavit, asserting her husband's intention to intrust to her a control on the defendant's conduct (and I take the facts to be, that she had given to him various sums, and that he continued to press for money), proceeds to state that the defendant returned her letters, having first taken copies, and now threatens to publish them. Whether that is an act which, if it can be done, ought to be done, the defendant is to decide. I am to decide whether it can be done. If it is supposed, that by reading the letters any impression may be made on my mind different from that which I am about to state, I will forbear to state it, till I have read them; otherwise I am now ready to proceed.

The counsel for the defendant intimated, that they had read one of the letters and thought it unimportant.

The Lord Chancellor. I am of opinion, that the plaintiff has a sufficient property in the original letters to authorize an injunction, unless she has by some act deprived herself of it. Laying out of the case much of what Mr. Wetherell has urged with so much ingenuity, I say only that though a letter is a subject of property, capable of being much more largely dealt with, in communication, than books, as, by reading to others, repeating passages, etc., yet the court has never been alarmed out of the practice of granting injunctions relative to letters to the extent to which it grants them in the case of books, because persons may assemble others, and read and recite to them: it is not deterred from giving that relief because it cannot give other relief more effectual.

In stating what Lord Hardwicke says on the subject, though I cannot at the moment refer to cases, I state that which, in cases, has been handed down as the law of the court. In Pope *v.* Curl, Lord Hardwicke went out of his way to state what he thought the doctrine on the subject of letters. Though the letters of eminent men, no one can suppose that they were all meant for publication; there are many passages in Swift's letters which he would be unwilling to have published. Lord Hardwicke says, "Another objection has been made by the defendant's counsel, that where a man writes a letter it is in the nature of a gift to the receiver; but I am of opinion that it is only a special property in the receiver: possibly the property of the paper may belong to him, but this does not give a license to any person whatsoever to publish them to the world." If he had stopped there, doubt might have been entertained whether the receiver was not at liberty to publish them to the world, but he proceeds, "for, at most, the receiver has only a joint property with the writer." 2 *Atk.* 342.

No one can read the case of Thompson *v.* Stanhope without seeing that this was understood at that time to be the doctrine of the court. Publication was there advertised in November, and the application to the court not made till March, and on that circumstance Lord Apsley proceeded in recommending the arrangement which he afterwards mentions: "The executors cannot be said to have given their consent, though his Lordship thought they would have done better if they had applied earlier, before the expense of printing was incurred." *Amb.* 739, 740. That is a strong part of the case. Those were letters of two classes, written by a father to his son; one class relating to the characters of individuals. The communication being made by letter is *prima facie* evidence, that that is all the communication which, on the subject of those characters, the writer intends to make. So of what relates to education: though they concern public characters, and a public subject—education, no one can maintain, that those discussions found in private letters gave to the person who received the letters a right to carry into public the opinions of the writer on those public characters, and the system of education. Lord Apsley therefore granted the injunction, observing, that the defendant "did very ill in keeping copies of the characters, when Lord Chesterfield meant that they should be destroyed and forgotten." Lord Apsley also cites the case of Mr. Forrester,[1] which certainly does not apply to letters. I believe the parties came to a compromise.

The doctrine is thus laid down, following the principle of Lord

[1] "In the case of Mr. Forrester *v.* Waller, 13 June 1741, an injunction for printing the plaintiff's notes, gotten surreptitiously without his consent, was granted." 4 Burr. 2331. In Donaldson *v.* Beckett, 2 Bro. P. C. Ed. Toml. 129, is enumerated among other "injunctions for printing unpublished MSS. without license from the author, 13 June 1741; Forrester *v.* Waller, for Forrester's Reports." Id. 138.

Hardwicke: I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it.

Such is my opinion; and it is not shaken by the case of Lord and Lady Perceval *v.* Phipps. I will not say that there may not be a case of exception, but if there is, the exception must be established on examination of the letters; and I think that it will be extremely difficult to say where that distinction is to be found between private letters of one nature, and private letters of another nature. For the purposes of public justice publicly administered, according to the established institutions of the country, the letters must always be produced; I do not say that of justice administered by private hands; nor do I say that there may not be a case, such as the Vice-Chancellor thought the case before him, where the acts of the parties supply reasons for not interfering: but that differs most materially from this case. In April last, the defendant having so much of property in these letters as belongs to the receiver, and of interest in them as possessor, thinks proper to return them to the person who has in them, as Lord Hardwicke says, a joint property, keeping copies of them without apprising her, and assigning such a reason as he assigns for the return. Now I say, that, if in the case before the Vice-Chancellor, Lady Perceval had given to Phipps a right to publish her letters, this case is the converse of that; and that the defendant, if he previously had it, has renounced the right of publication.

On these grounds the injunction must be continued.

Motion refused.[1]

[1] "There are only two grounds upon which it has been insisted that private letters are an exception from the general doctrine. The first is, that the transmission of the letters vests the whole property in the receiver, and operates as an absolute gift. The second, that if the writer retains any property at all, it is only in such letters as are stamped with the character and possess the attributes of literary compositions.

"The first ground of exception, as plainly overruled by the decisions, was very properly abandoned by the counsel of the defendants. He rested his whole argument upon the second; and, holding himself excused from any closer examination of the English cases, relied upon the decision of Chancellor Walworth, in Hoyt *v.* McKenzie, as a binding and conclusive authority. (13 Barb. Ch. Cases. 324.)

"The proposition which we hold to have been settled as law, for more than a century before the judgment in Hoyt *v.* McKenzie was pronounced, is that which was laid down by Sir Samuel Romilly, and affirmed by the decision of Lord Eldon, in Gee *v.* Pritchard (2 Swanston, 418). It is that "the writer of letters, though written without any purpose of publication or

COMPANY OF STATIONERS CASE.

IN CHANCERY, BEFORE LORD CHANCELLOR NOTTINGHAM, 1681.

[2 *Cases in Chancery* 76.][1]

The king granted to the company of stationers the printing and vending of statute books. The defendant caused the statutes to be printed in Amsterdam, and in great bails and quantities to be imported to sell where they remained. The plaintiffs exhibited a bill complaining of it. The defendants appeared, but the time of answer was not expired till the 1st of October: I moved that the books might remain at the custom-house till answer. On debate.

The Lord Chancellor ordered an injunction to stay the books there, not only till answer, but in *perpetuum;* for the printing of the laws was matter of state, and concerned the state.[2] But for other books, viz. the Whole Duty of Man, and other like books being imported and staid, he left them to the ordinary course.

HILLS *v.* UNIVERSITY OF OXFORD.

IN CHANCERY, BEFORE LORD KEEPER GUILFORD, 1684.

[1 *Vernon* 275.]

In the eighth year of King Charles the First, there was a patent granted to the University of Oxford to print bibles and other books not prohibited. 30 Martij. 8 Car. that patent is confirmed, and limits that

profit, or any idea of literary property, possesses such a right of property in them that they can never be published without his consent, unless the purposes of justice, civil or criminal, require the publication." If this proposition be true, it follows that the distinction which has been supposed to exist between letters possessing a value as literary compositions, and ordinary letters of friendship or business, is wholly groundless. The right of property is the same in all, and in all is entitled to the same protection." Per Duer, J., in *Woolsey* v. *Judd* (1855) 4 Duer, 379.

Lack of space prevents the printing of this admirable opinion. The student cannot afford to neglect it.

[1] For subsequent proceedings against third parties in the same case, see 2 Cas. Ch. 93.

[2] In Anonimous (1682) 1 Vern. 120 it was urged that Chancery was a Court of State and inasmuch as the sale of English Bibles printed beyond the

there shall be but two presses and three printers. The plaintiffs claim as the King's printers, under several patents continued down by mesne assignments, and bring their bill to restrain the defendants from printing bibles, &c. And it was observed, that the bible was translated at the King's own charge; so that the copy was his; and that printing was brought in by Henry 6th at his own charge.

The Lord Keeper was of opinion, that it was never meant by the patent to the University, that they should print more than for their own use, or at least but some small number more, to compensate their charge: but as they now manage it, they would engross the whole profit of printing to themselves, and prevent the King's farmers of the benefit of their patent: however he said, the validity of the several patents was a matter proper to be determined at law, and the plaintiffs were now proper only for a discovery, and therefore ordered that the plaintiffs should bring an action at law in the King's Bench, against the University, or the defendants Parker and Guy who claimed under the patent to the University, and that it should be tried at the bar: and the defendants were to admit they had printed a competent number of bibles at the trial. And though the plaintiffs pressed much for an injunction to stay the University printers from going on with the printing of bibles until the trial had settled the right, yet the Lord Keeper refused to grant it, in regard that in case the right should be found with them, they would by such prohibition receive a prejudice, that he could not compensate nor make good to them.

GYLES *v.* WILCOX.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1740.

[2 *Atkyns* 141.]

A bill was brought by Fletcher Gyles, bookseller, for an injunction to stay the printing of a book in octavo, intitled Modern Crown Law; it being suggested by the bill to be colourable only, and in fact borrowed verbatim from Sir Matthew Hales Pleas of the Crown, only some old

sea cause great mischief, public policy might require the Court of State to enjoin the sale.

But Lord Keeper North said: "I do not apprehend the *Chancery* to be in the least a Court of State; neither can I grant an injunction in any case; but where a man has a plain right to be quieted in it." He therefore recommended a trial at law to establish the right, "and when the trial is over, come back again."

statutes have been left out which are now repealed; and in this new work all the Latin and French quotations in the Historia Placitorum Coronæ are translated into English; and for this reason it is insisted the defendant is within the letter of an act of parliament, made in the eighth year of queen Ann, c. 19. intitled, An act for encouragement of learning, by vesting the copies of printed books in the authors, or purchasers of such copies, during the term of fourteen years.

LORD CHANCELLOR. The question is, Whether this book of the New Crown Law, which the defendant has published, is the same with Sir Matthew Hale's Histor. Placit. Coronæ, the copy of which is now the property of the plaintiff.

Where books are colourably shortened only, they are undoubtedly within the meaning of the act of parliament, and are a mere evasion of the statute, and cannot be called an abridgment.

But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author.

If I should extend the rule so far as to restrain all abridgments, it would be of mischievous consequence, for the books of the learned, *les Journels des Scavans,* and several others that might be mentioned, would be brought within the meaning of this act of parliament.

In the present case it is merely colourable, some words out of the Historia Placitorum Coronæ are left out only, and translations given instead of the Latin and French quotations that are dispersed through Sir Matthew Hale's works; yet not so flagrant as the case of Read *versus* Hodges, for there they left out whole pages at a time: but I shall not be able to determine this properly, unless both books were read over, and the case fairly stated between the parties.

Mr. Attorney General has said I may send it to law to be determined by a jury; but how can this possibly be done? It would be absurd for the chief justice to sit and hear both books read over, which is absolutely necessary, to judge between them, whether the one is only a copy from the other.

The court is not under an indispensable obligation to send all facts to a jury, but may refer them to a master, to state them, where it is a question of nicety and difficulty, and more fit for men of learning to inquire into, than a common jury.

This I think is one of those cases where it would be much better for the parties to fix upon two persons of learning and abilities in the possession of the law, who would accurately and carefully compare them, and report their opinion to the court.

The House of Lords very often, in matters of account which are extremely perplexed and intricate, refer it to two merchants named by the

parties, to consider the case, and report their opinions upon it, rather than leave it to a jury; and I should think a reference of the same kind in some measure would be the properest method in the present case.[1]

BOULTON *v.* BULL.

IN CHANCERY, BEFORE LORD CHANCELLOR LOUGHBOROUGH, 1796.

[3 *Vesey* 140.]

Boulton and Watts had obtained a patent for a fire-engine; under which they had been in possession twenty-seven years.[2] The bill was filed for an injunction to restrain Defendants from infringing the patent; and an injunction was obtained, that the question as to the validity of the patent might be tried in an action. The Plaintiffs brought an action in the Court of Common Pleas; and obtained a verdict, subject to the opinion of the Court upon a case stated. Upon argument of that case the Court was equally divided.[3]

Mr. Graham and Mr. Alexander moved to dissolve the injunction.

Attorney General [Sir John Scott], for the Plaintiffs. It is the most ordinary jurisdiction of the Court to say, they will not alter the possession, till the right is decided. In the case of waste it is the specific right of the party to have the interference of the Court. In that case the Court would not permit the timber to be cut upon giving security for the value. So here there is a specific right, which the law will protect. I admit, we are bound to bring another action.

Lord Chancellor [LOUGHBOROUGH]. I cannot put the patentees upon the acceptance of terms, that upon collateral reasons they think may be disadvantageous to the exercise of the right, of which they are in full possession: neither can I put them out of possession upon the difference of opinion of the Court. That is not the fault of the Plaintiffs. What has passed in the Court of Common Pleas does not shake their right; but strongly supports it. The verdict, though it has failed of effect, is not to be disregarded. The opinions of the Judges on both sides are deserving of great respect. If nothing can be done upon this, there must be another action. In the mean time the injunction must be continued. I will not put them to compensation. I will not disturb the possession of their specific right. It is of notoriety, that this fire-engine has been erected in many parts of the country with great advantage.

[1] See same case in 3 Atk. 269 in which the question of infringement was referred to two arbiters for report.

[2] The patent, which was originally granted in 1769 for 14 years, was by Stat. 15, Geo. III. renewed for 25 years.—Reporter's note.

[3] 2 H. Blackst. 453; Hornblower *v.* Bolton, 8 Term Rep. 95.—Reporter's note.

For the Defendants. It was then desired, that the action might be brought in the Court of King's Bench: to which it was answered, that they might have a special verdict in the Common Pleas; upon which there might be a writ of error.

Lord Chancellor. I will not lay them under any terms in bringing the action.[1]

LIVINGSTON *v.* VAN INGEN.

COURT OF ERRORS OF NEW YORK, 1812.

[9 *Johnson* 507.]

On appeal from the decree of the Chancellor refusing an injunction prayed by Robert R. Livingston and Robert Fulton to whom the legislature of the state had granted the exclusive right of "Constructing, making, using, employing, and navigating all and every species or kinds of boats, or water craft which might be urged or impelled through the water by the force of fire or steam, in all creeks, rivers, bays and waters whatsoever within the territory and jurisdiction of New York." The bill alleged that the respondents in contravention of this exclusive right were navigating a steamboat upon the Hudson without any license from the appellants.

KENT, Chief Justice.[2] If the legal right be in favor of the appellants, the remedy prayed for by their bill is a matter of course. One of the learned counsel for the respondents, with his usual frankness, seemed, in a great degree, to concede this point.

Injunctions are always granted to secure the enjoyment of statute privileges of which the party is in the actual possession, unless the right be doubtful. This is the uniform course of the precedents. I believe there is no case to the contrary; and the decisions in the English Chancery, on this point, were the same before as since the American revolution; and we are, consequently, bound by them as a branch of the common law. It appears, by the facts stated in the bill, and which we must take to be true, as they have been sworn to, and are not answered or denied, that the appellants had been, for three years, in the actual and exclusive enjoyment of their statute privilege when the respondents interfered to disturb that right and that enjoyment.

It will be necessary to attend, for a moment, to the most prominent English cases, on the subject of injunctions; and on this point I shall be very brief.

[1] Harmer *v.* Plane, *post*, vol. xiv., 130; Hill *v.* Thompson, 3 Mer. 622.—Reporter's note.

[2] Only a part of the opinion of the learned Chief Justice is given.

In Gyles *v.* Wilcox and others, which was as early as the year 1740, (2 Atk. 141. S. C. 3 Atk. 269,) there was a bill filed for an injunction to stay the printing of a book, on suggestion, that the book, pretending to be a different work, was in truth, an invasion of the complainant's copyright, under the statute of Anne. The lord chancellor referred the cause, by consent, to arbitrators, to examine whether the one book was a copy from the other; and though that point was not clear, he allowed an injunction and continued it in the mean time. So, also, in the case of Blackwell *v.* Harper, in the year 1740, (2 Atk. 92,) a bill was exhibited to establish a right under a statute of 8 Geo. II. c. 13, for encouraging the arts of designing, engraving, &c. and to restrain the defendant from copying the complainant's engravings of medicinal plants, and an injunction was decreed, though the statute said nothing about an injunction, and had given, as against the offender, a forfeiture of the plates and sheets engraved, and an additional penalty of five shillings for every print, to be recovered by suit at law. In another case, in the same year, 1740, before the same chancellor, (1 Ves. 476,) he admitted, that when the right appeared by matter of record, or was grounded upon an act of parliament, it was a foundation for an injunction before answer. These cases I have particularly selected, because two of them were cases of injunction, founded on a statute right, and where the statute had also given a forfeiture, and because these cases were long before our revolution, and were the decisions of so correct and distinguished a chancellor as Lord Hardwicke.

It is impossible, in any cause, to produce cases more in point or more controlling; and they put the authority and duty to grant an injunction, in a case of clear statute right, beyond contradiction. There are many other cases in the English Chancery, to the like effect, all of which I shall not stay to examine. (Baskett *v.* Parsons, 1718, decided by Sir J. Jekyl, and cited in 13 Ves. 493; Smith *v.* Clark, Dick. 455; Hicks *v.* Raincock, Dick. 647; Pope *v.* Curl, 2 Atk. 342; Bell *v.* Walker and others, 1 Bro. 451.) It will be sufficient, by referring to a few of them, to show the uniform language of the equity courts. The case of The City of London *v.* Pughs (3 Bro. Ch. Cas. 374) arose as early as 1727, and as it was decided by the House of Lords, upon an appeal, it merits the more attention. The question there was, on a penalty given by a lease of one hundred pounds an acre, for digging up the soil, and yet the court ordered that the chancellor issue an injunction until the hearing, to stay the trespass, notwithstanding the party had his remedy for the penalty. In the case of Bolton *v.* Bull, which was in chancery, as late as 1796, (3 Ves. 140,) there was a bill for an injunction against infringing a patent right for a fire engine, and it was granted, and the validity of the patent was left, in the mean time, to be tried at law. It was there admitted to be the most ordinary jurisdiction of the Court of Chancery, not to alter the possession until the right was decided, and the party in enjoyment of his patent privilege was considered as in such

possession. In a late case, before the present Lord Chancellor Eldon, (The Universities *v.* Richardson, 6 Ves. 707) it was held, that in the case of a patent right, if the party gets his patent and puts it in execution, his possession, under color of that title, is good enough to enjoin a disturber from interfering, and to continue the injunction until it is proved at law that he had no title. In a still later case, (14 Ves. 130,) the court expressed itself in strong terms against the invasion of a patent right, and said, that unless the injunction was granted, any person might violate the patent, and the consequence would be, that the patentee would be harassed with litigation.

I cite these later cases to show that the law has been settled, in England, for the last seventy years at least, and has been preserved in a steady, uniform course, under a succession of their ablest and wisest men. The principle is, that statute privileges, no less than common law rights, when in actual possession and exercise, will not be permitted to be disturbed, until the opponent has fairly tried them at law, and overthrown their pretension. And is not this a most excellent principle, calculated to preserve peace, and order, and morals, in the community; and if it was not the law, yet deserving to be the law, and well worthy of our encouragement and sanction? The federal courts in this country have thought so; for under the patent law of congress, they have equally protected the right by injunction. The case of Morse *v.* Reid was an injunction bill filed in 1796, to restrain the defendant from reprinting Winterbotham's History, which, the complainant alleged, was an invasion of the copyright of his American Geography. The propriety of the injunction was not questioned; it issued in the first instance. The complainant recovered 1,500 dollars, and the injunction was made perpetual. So in the late case of Whitney *v.* Fort, which arose in Georgia, upon a violation of the complainant's patent for a machine for cleaning cotton, an injunction was granted, in the first instance, and was afterwards made perpetual, at the Circuit Court, at which Judge Johnson presided. As far, then, as authority goes, it is in favor of the injunction, and if we are satisfied, in this case, of the appellants' right, we cannot hesitate about the remedy. The act which the legislature passed at the last session, making it expressly the duty of the Chancellor to grant an injunction as to all other boats except the two then built, proves very clearly the sense of the legislature that this was a fit and proper remedy in the case. Those two boats were excepted out of the law, merely because it was improper to interfere with a pending suit, and the statute did not impair the pre-existing remedy by injunction; it only made it more clear and peremptory thereafter; and there is no reason why the injunction should issue against one set of boats, and not against another.

It would only be productive of litigation and mischief, to allow the respondents to continue the use of their boats, if the right be against them. Their counsel admit that they must not only forfeit the boats, but must answer in damages for all the intermediate profits. If the legal

right be with the appellants, this is the proper court, and this is the proper time to declare it. This court, from its peculiar constitutional structure, unites with it the highest court of common law, and nothing would be more useless than to withhold an injunction until the chancellor had sent the question to be tried at law, when the judges before whom it is to be tried, are members of this court, and have already declared their opinion. The legal question can never be tried by a jury. It is not a question of fact. The single point is the constitutionality of the statutes. That point never can be more fully and more ably argued than it has been before this court, and if we are of opinion that the acts are constitutional, they *must* be obeyed. We are bound to cause them to be obeyed. There is no escape from this duty.

If we refuse the injunction, it ought to be for some substantial reason. We must not put it upon the mere *hoc vola, sic jubeo, sit pro ratione voluntas.* There must be some solid principle, that will correspond with the character, as well as satisfy the conscience of this court. If the laws are valid, it would be of pernicious consequence not to arrest the further progress of their violation. It is impossible for any act to be committed which attracts more universal notice, and if wrong and illegal, none which has a more fatal influence upon the general habits of respect and reverence for the legislative authority. The boats cannot run but in the face of day, and in the presence, as it were, of the whole people, whose laws are set at defiance, nor without seducing thousands, by the contagion of example, into an approbation and support of the trespass.

I am sensible that the case is calculated to excite sympathy. I feel it with others, and I sincerely wish that the respondents had brought the laws to a test, at less risk and expense; for every one who had eyes to read, or ears to hear the contents of our statute book, must have been astonished at the boldness and rashness of the experiment. But in proportion to the respectability and strength of the combination, should be the vigor of our purpose to maintain the law. If we were to suffer the plighted faith of this state to be broken, upon a mere pretext, we should become a reproach and a by-word throughout the union. It was a saying of Euripides, and often repeated by Cæsar, that if right was ever to be violated, it was for the sake of power. We follow a purer and nobler system of morals, and one which teaches us that right is never to be violated. This principle ought to be kept steadfast in every man's breast; and above all, it ought to find an asylum in the sanctuary of justice.

I am accordingly of opinion, that the order of the Court of Chancery be reversed, and that an injunction be awarded.

CROTON TURNPIKE COMPANY *v.* RYDER.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1815.

[1 *Johnson's Chancery* 611.]

A bill to enjoin interference of the defendant with the franchise of the plaintiffs to maintain a toll road.

THE CHANCELLOR. The plaintiffs have shown a clear and undisputed right, by statute, to the taking of toll at the gates, and for the use of the turnpike road mentioned in the pleadings. They were, likewise, at the commencement of the suit, in the actual possession and exercise of that exclusive right; and the question is, whether the establishment of the open and common road, designated on the map by the figures 1, 2, 3, be not a disturbance of that right, amounting to a private nuisance.

There can be no question as to the right of the plaintiffs. It was given to them by the acts of the legislature of the 13th of March, 1807, and the 18th of March, 1808; and it is shown and admitted, that they conformed to the conditions upon which the grant was made. The road was duly laid out, and report duly made by commissioners appointed according to law, and the gates were then erected in pursuance of the governor's license. The road, as worked and constructed, was also established by the act of the 8th of April, 1811. The defendants admit that they combined together to purchase jointly of William Haight, the strip of land on which the road marked 1, 2, 3, complained of, was established and opened. They admit the consideration of 250 dollars was raised by contribution, and a deed in fee taken to all of them, except Frederick Graham, on the 10th of December, 1811. They admit that they purchased the land to be laid out as a road for their benefit, and because it would be a public advantage. They admit that this new road has not been established as a public road; and that the distance by that road from A. to D., on the map, is only 4 chains and 1 link shorter than the distance between the same points by the way of the toll-gate. They admit that the new road has been kept open for public use and travel, and maintained as such by private expense, by not impeding travellers from using it; and they admit that this road may, and does, enable persons to avoid passing through the gate and paying toll to the plaintiffs. After these admissions, it is in vain for the defendants to allege that the road was established without any views injurious to the rights of the plaintiffs. The facts speak for themselves; and I think it is impossible for any person to cast his eye upon the map, which is made an exhibit in the cause, without being struck, at once, with the conviction, that the injury is direct, palpable, and inevitable, and that, if no such turnpike gate existed, no such new road would have been purchased, made, and kept open.

It is, then, a plain case of a material and mischievous disturbance of the plaintiffs in the enjoyment of the statute privilege, which was granted to them by the legislature for public purposes, and founded on a valuable consideration.

The only question is as to the remedy, and this appears to me to be equally certain.

It is settled that an injunction is the proper remedy to secure to a party the enjoyment of a statute privilege, of which he is in the actual possession, and when his legal title is not put in doubt. The English books are full of cases arising under this head of equity jurisdiction. (Bush *v.* Western, Prec. in Chan. 530. Whitchurch *v.* Hide, 2 Atk. 391.) But I need not enter into this discussion, for the point has been recently settled in this state, in the case of Livingston and Fulton *v.* Van Ingen and others, (9 Johns. Rep. 507,) and I shall rest upon the authority of that case, and upon the application of the principles on which it was decided.

The equity jurisdiction in such a case is extremely benign and salutary. Without it, the party would be exposed to constant and ruinous litigation, as well as to have his right excessively impaired by frauds and evasion.

If such a contrivance as this case presents, is to be tolerated, all our statute privileges of the like kind, on which millions have been expended, would be rendered of little value, and the moneys have been laid out in vain.

I shall, accordingly, decree, that the defendants be perpetually enjoined from opening or using, or permitting to be opened and used, as a road for public use or travel, the road designated on the map by the figures 1, 2, 3; and that the same be closed up so as to hinder persons travelling on the turnpike road from using it as an open road; and that the defendants, except Frederick Graham, pay the costs of this suit; and that the bill, as to him be dismissed.

In VICKSBURG WATERWORKS CO. *v.* VICKSBURG (1902), 185 U. S. 65, 81, Mr. Justice SHIRAS said: The bill prays for an injunction to restrain the defendant from assuming to abrogate and take away the franchises and contract rights of the complainant, and from attempting to coerce the company to sell its works to the defendant for an inadequate price, and that said act of the legislature of Mississippi, adopted on March 9, 1900, and said resolution and ordinance adopted and passed by said city on the 7th day of November, 1900, be declared to impair the obligations of said contract between said city and said Bullock & Company and their assigns, and to cast a cloud upon the title, franchises and rights of complainant, and said act, ordinance and resolution, and each of them, are alleged to be in contravention of the Constitution of the United States in this, that

they impair the obligations of said contract between said city and said Bullock & Company and their assigns.

It cannot be seriously contended that, under the act of March 18, 1886, authorizing the city to provide for the erection and maintenance of a system of waterworks, and to contract with a party or parties to build and operate waterworks, and under the ordinance of the city of November 18, 1896, providing for a supply of water to the city and its inhabitants by contracting with Samuel R. Bullock & Company, their associates, successors and assigns, and the acceptance of said ordinance by Samuel R. Bullock & Company, no contract was entered into. The subject-matter of the contract was within the powers of the city to make; the terms are explicitly set forth in the ordinance; the works erected were approved by the city, and the respective obligations created by the contract were duly complied with without question or complaint, for a period of fourteen years.

Whether this act of the legislature of Mississippi is, in its terms, subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations, we need not determine at this stage of the case, because we think that the ordinance of the city of November 7, 1900, whereby the mayor was instructed to notify the waterworks company that the mayor and aldermen deny any liability upon any contract for the use of the waterworks hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by the waterworks company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the Circuit Court as presenting a Federal question.

It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the Circuit Court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in

disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights.[1]

LEATHER CLOTH COMPANY, LTD. *v.* AMERICAN LEATHER CLOTH COMPANY.

IN CHANCERY, BEFORE LORD CHANCELLOR WESTBURY, 1864.

[10 *Jurist, new series,* 81.]

This was an appeal by the defendants from a decree of Sir W. P. Wood, V. C. (reported 1 Hem. & Mil. 271), whereby his Honor granted a perpetual injunction in a suit instituted for the purpose of restraining the defendants from an alleged infringement of the plaintiffs' trade-mark. The facts sufficiently appear in the judgment below.

LORD CHANCELLOR.—Upon a review of the numerous cases which have been decided in this court on the subject of trade-marks, there appears to be some uncertainty and want of precision in the language of the different judges, as to the ground on which a court of equity interferes to protect the enjoyment of a trade-mark, and also on the question whether the right to use a trade-mark admits of being sold and transferred by one man to another.

At law the remedy for the piracy of a trade-mark is by an action on the case, in the nature of a writ of deceit. This remedy is founded on fraud, and originally it seems that an action was given, not only to the trader whose mark had been pirated, but also to the buyer in the market, if he had been induced by the fraud to buy goods of an inferior quality. In equity, the right to give relief to the trader whose trade has been injured by the piracy, appears to have been originally assumed by reason of the inadequacy of the remedy at law, and the necessity of protecting property of this description by injunction. But although the jurisdiction is now well settled, there is still current in several recent cases language which seems to me to give an inaccurate statement of the true ground on which it rests. In Croft *v.* Day (7 Beav. 88) and Perry *v.* Truefitt (6 Beav. 73), the late Lord Langdale is reported to have used words which place the jurisdiction of this Court to grant relief in cases of the piracy of trade-marks, entirely on the ground of the fraud that is committed when one man sells his own goods as the goods of another. The words of the learned judge are—"I own it does not seem to me that

[1] The case made a final appearance before the Supreme Court, and the views expressed in the previous hearing were reaffirmed. Vicksburg Water Works Co. *v.* Vicksburg (1906) 202 U. S. 453.

a man can acquire a property merely in a name or mark;" and, in like manner, the learned Vice-Chancellor whose decision I am now revising, is reported to have said, "This question never rests upon property at all, but it is simply a question whether or not the act of the defendant is such an act as to hold out that his, the defendant's, goods are the manufacture of another person." But, with great respect, this is hardly an accurate statement; for, first, the goods of one man may be sold as the goods of another without giving to that other person a right to complain, unless he sustains, or is likely to sustain, from the wrongful act some pecuniary loss or damage. Thus, in the case of Clarke *v.* Freeman (11 Beav. 112), an eminent physician, Sir James Clarke, applied for an injunction to restrain a chemist from publishing and selling a quack medicine under the name of "Sir James Clarke's Pills;" but the Court refused to interfere, because it did not appear that Sir James had sustained any pecuniary injury. And, secondly, it is not requisite for the exercise of the jurisdiction that there should be fraud or imposition practised by the defendant at all. The Court will grant relief, although the defendant had no intention of selling his own goods as the goods of the plaintiff, or of practising any fraud either on the plaintiff or the public.

If the defendant adopts a mark in ignorance of the plaintiff's exclusive right to it, and without knowing that the symbols or words so adopted and used are already current as a trade-mark in the market, his acts, though innocently done, will be a sufficient ground for the interference of this Court. This is plain from the decision of Lord Cottenham in the case of Millington *v.* Fox (ubi sup.), to which I entirely assent, and from the learned Vice-Chancellor's own opinion in the case of Welch *v.* Knott (4 Kay & J. 747). Imposition on the public, occasioned by one man selling his goods as the goods of another, cannot be the ground of private action or suit. In the language of Lord Thurlow in Webster *v.* Webster (3 Swanst. 490, note), fraud upon the public is no ground for the plaintiff's coming into this Court. It is, indeed, true, that unless the mark used by the defendant be applied by him to goods of the same kind as the goods of the plaintiff, and be in itself such that may be, and is, mistaken in the market for the trade-mark of the plaintiff, the Court will not interfere, because there is no invasion of the plaintiff's right; and thus the mistake of buyers in the market, under which they, in fact, take the defendant's goods as the goods of the plaintiff—that is to say, imposition on the public—becomes the test of the property in the trade-mark having been invaded and injured, but not the ground on which the Court rests its jurisdiction. The representation which the defendant is supposed to make, that his goods are the goods of another person, is not actually made otherwise than by his appropriating and using the trade-mark which such other person has an exclusive right to use in connection with the sale of some commodity; and if the plaintiff has an exclusive right so to use any particular mark or symbol, it becomes

his property for the purposes of such application, and the act of the defendant is a violation of such right of property, corresponding with the piracy of copyright or the infringement of a patent. I cannot, therefore, assent to the dictum that there is no property in a trade-mark.

It is correct to say that there is no exclusive ownership of the symbols which constitute a trade-mark apart from the use or application of them; but the word "trade-mark" is the designation of these marks or symbols when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property. The true principle, therefore, would seem to be, that the jurisdiction of the Court in the protection given to trade-marks rests upon property, and that the Court interferes by injunction, because that is the only mode by which property of this description can be effectually protected.

The same things are necessary to constitute a title to relief in equity, in the case of the infringement of the right to a trade-mark, as in the case of the violation of any other right of property. But when the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representation; for if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity.[1]

THE EMPEROR OF AUSTRIA *v.* DAY AND KOSSUTH.

IN THE COURT OF APPEAL, 1861.

[3 *De Gex, Fisher & Jones* 217.]

The defendant Kossuth, the distinguished Hungarian statesman and patriot, was living in exile in Great Britain, and, in anticipation of an uprising of the people of Hungary against the Austrian domination, he persuaded Messrs. Day & Sons (well-known lithographers of London) to prepare plates for the printing of notes purporting to be notes of the Hungarian nation. The notes were intended for circulation as money in Hungary.

The bill alleged:

That the total amount of these notes which was being prepared was upwards of 100,000,000 florins. That Day & Sons had in their possession a large quantity of them entirely or nearly completed, and,

[1] See notes in 6 Columbia Law Rev. 349, 473.

unless restrained by the court, would deliver them to Kossuth. That Kossuth intended, as soon as he received them, to send them to Hungary and endeavor to introduce some of them into circulation there, and use the remainder for other purposes in Hungary, in violation of the rights and prerogative of the plaintiff as king of that country, and, amongst other purposes, for the promotion of revolution and disorder there.

To prevent the delivery of any of these notes to Kossuth and to obtain the cancellation of the notes in the possession of Day & Sons, and to restrain them from further printing the said notes, the Emperor of Austria filed his bill in equity.

The relief prayed for was granted by Vice-Chancellor Stuart and from his decision an appeal was taken.[1]

The LORD JUSTICE TURNER.[2] I have but little to add in this case. This bill, as I read it, puts the plaintiff's case upon three grounds: 1st. Violation of the rights and prerogative of the plaintiff as King of Hungary, by the promotion of revolution and disorder, and otherwise. 2d. Injury to the State of Hungary, by the introduction of a spurious circulation into that kingdom. And 3d. Injury to the subjects of the plaintiff, by the same cause. The charges of the bill in these respects are that the defendant Kossuth intends to use the notes in question in violation of the rights and prerogative of the plaintiff as King of Hungary, and, amongst other purposes, for the promotion of revolution and disorder there, and that the introduction of the notes into Hungary will create a spurious circulation in that country, and by that and other means cause great detriment to the State and to the subjects of the plaintiff.

That this court has no jurisdiction to interfere upon the ground that the notes in question are intended to be used for the purpose of promoting revolution and disorder in the kingdom of Hungary was freely conceded at the bar by the plaintiff's counsel, and can admit of

[1] The admirable decision of Sir John Stuart as reported below in 2 Giff. 628, is important from the standpoint of international law, for the learned Vice-Chancellor declared the law of nations to be part of the law of England. The argument of Sir Hugh Cairns (pp. 665-675) is a storehouse of intelligence and learning.

[2] The opinions of Lord Chancellor Campbell and Lord Justice Knight Bruce have been omitted.

In following with reluctance the judgment of Turner in *Pyrke* v. *Waddingham* (1852) 10 Hare 1, Lord Ronilly, M. R., said:

"I must say, with the greatest possible respect and admiration for the legal abilities of my late lamented friend, Lord Justice *Turner*, no man was more confident of his own opinion, and no man thought it less likely that a man of sense would differ from him. If he had decided it the other way, I am satisfied he would have believed any reasonable man would also have decided it the same way." *Mullings* v. *Trinder* (1870) L. R. 10 Eq. 449, 456.

no doubt. This view of the case, therefore, may be laid out of consideration. It was urged, however, on the part of the defendants, that the prevention of revolutionary designs was the main if not the sole object of this bill, and that the court ought, upon that ground, to have refused its interference, but we can know nothing of what is passing or may be intended in Hungary, except what is judicially before us; and if the bill states other grounds affording title to relief, we are bound, as I apprehend, to pay attention to those grounds.

This brings us to the question, whether the infringement of the prerogative rights of a foreign sovereign constitutes a ground of suit in this court. The case was very much argued upon this point. It was urged for the plaintiff that the right of coining money, the *jus cudendæ monetæ*, was universally acknowledged to be a prerogative of sovereigns, vested in them for the benefit of their subjects; that this prerogative right extended no less to the creation of paper money than to the stamping of coin; that it was acknowledged by all nations and recognized by international law; and that, international law being part of the law of England, this court would interfere in favor of the rights recognized by and founded upon it. That the right of coining money is the prerogative of a sovereign is laid down by all the writers on international law, and I see no reason to doubt that the prerogative right reaches the issue of paper money. Burlamaqui, *Vol.* 3, *p.* 241, indeed, mentions and treats of it as so extending. To this extent, therefore, I agree with the argument on the part of the plaintiff, but the argument failed to satisfy my mind that this court can or ought to interfere in aid of the prerogatives of a foreign sovereign. The prerogative rights of sovereigns seem to me, as at present advised, to stand very much upon the same footing as acts of State and matters of that description, with which the municipal courts of this country do not and cannot interfere. Such acts and matters are recognized by international law no less than the prerogative rights of sovereigns; but the municipal courts of this country have disclaimed all right to interfere with respect to them. If the subject of one State infringes the prerogative of the sovereign of another State, the remedy, as I apprehend, lies in an appeal by the offended sovereign to the sovereign of the State to which the offender belongs, and if redress be unjustly refused, the refusal may, as I apprehend, even be made the ground of war. This, I think, may be gathered from Vattel, and it seems to me important to be adhered to; for the prerogative of peace and war belongs to the sovereign of every State, and it can hardly be denied that the interference of the municipal courts in such matters may tend very much to embarrass if not to fetter the free exercise of these latter prerogatives. The same reasoning which applies to the prerogative rights of sovereigns seems to me to apply also to the political rights of nations; and so far, therefore, as this bill is founded upon the prerogative rights of the plaintiff, or upon the political rights of his subjects, my

present opinion, speaking with all respect of what fell from the Vice-Chancellor in the course of his judgment, is against the decree which he has made.

The conclusion to which I have come in this case does not, however, depend upon these points; and I do not think it necessary, therefore, to enter more fully into them, or into the arguments bearing upon them; nor do I wish to be understood as giving any final opinion upon them. This case, as it seems to me, may and ought to be decided upon the third ground on which the case is rested by the bill,—the injury to the subjects of the plaintiff by the introduction of a spurious circulation. I take it to be now well settled, although upon looking into the authorities I have been surprised to find that the point was doubted even in the time of Lord LOUGHBOROUGH, 3 *Ves.* 431, that a foreign sovereign may sue in the courts of this country, and that he may sue in this court on the behalf of his subjects; and this bill, if it does not require, certainly admits the construction, that it is filed by the plaintiff in his representative character on behalf of the subjects of his kingdom, for it distinctly alleges a case of injury to them. We must consider, then, what is the nature of this injury. I think it is an injury not to the political but to the private rights of the plaintiff's subjects. What is proposed to be done is to introduce into the kingdom of Hungary an enormous number of notes which, on the face of them, purport that they will be received in the public offices of the State and that they are guaranteed by the State, and which purport also to be signed in the name of the nation by the defendant, Louis Kossuth. That the effect of this introduction will be to disturb the circulation of the kingdom cannot, in my opinion, be doubted; and what will be the effect of that disturbance? Surely to endanger, to prejudice, and to deteriorate the value of the existing circulating medium, and thus to affect directly all the holders of Austrian banknotes, and indirectly, if not directly, all the holders of property in the State. The same great authority to which I have referred has very clearly pointed out these consequences, *Vattel, Book* 1, *c.* 10. But it is said that the acts proposed to be done are not the subject of equitable jurisdiction, or that, if they are, the jurisdiction ought not to be exercised until a trial at law shall have been had. To neither of these propositions can I give my assent. I agree that the jurisdiction of this court in a case of this nature rests upon injury to property, actual or prospective, and that this court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property, but I think there are here rights of property quite sufficient to found jurisdiction in this court. I do not agree to the proposition, that there is no remedy in this court if there be no remedy at law, and still less do I agree to the proposition that this court is bound to send a matter of this description to be tried at law. The highest authority upon the jurisdiction of this court, Lord REDES-

DALE, in his Treatise on Pleading, in enumerating the cases to which the jurisdiction of the court extends, mentions cases of this class: "Where the principles of law by which the ordinary courts are guided give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent." It is plain, therefore, that, in the opinion of Lord REDESDALE, who was pre-eminently distinguished for his knowledge of the principles of this court, the jurisdiction of the court is not limited to cases in which there is a right at law. There is, indeed, a familiar instance in which the jurisdiction is not so limited,—the cases of waste. In some cases of waste there was no right and no remedy at law, but this court did not on that ground refuse its interference. I do not refer to the case of equitable waste, which, however, is another instance, but to the cases in which there was an intervening legal estate. To say that the jurisdiction of this court is limited only by the principles of universal justice would no doubt be going too far, and I must not be understood so to construe what Lord REDESDALE has said. I take the passage to refer to cases in which there is what the law in principle acknowledges to be a wrong, but as to which it gives no remedy, as in the case of waste to which I have referred. The case before us may, I think, well be tried by this rule. If the property of an individual is affected by an undue and unauthorized use of his name, the law would no doubt give a remedy. I am not satisfied that the law would not give the same remedy in the case of the undue and unauthorized use of the name of a nation or State; but whether it would do so or not, and if not, whether it would be prevented from doing so by the absence of positive law or by mere formal impediments as to the right to sue, I think the authority to which I have referred, and the instance which I have mentioned of the application of it, warrant me in saying that the case falls within the jurisdiction of this court. It was said, on the part of the defendants, that the court has only interfered in cases of this nature where there was a right at law, or where there was trust or confidence; but if the jurisdiction exists, the extent of it cannot be limited by the instances in which it has been applied. It was also attempfed to be argued on the part of the defendants, that, assuming the existence of the jurisdiction, there was no sufficient case for the exercise of it. But upon this point I have felt no doubt. The jurisdiction of this court is preventive as well as remedial, and the affidavit of the defendant Kossuth himself quite satisfies my mind that there is a proper case for the exercise of it. Subject, therefore, to the qualification to which the Lord Chancellor has adverted, I think that this decree must stand.[1]

[1] "The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. This power has been distinctly recognized in an important modern case,

ROBERSON *v.* ROCHESTER FOLDING BOX CO.

IN THE COURT OF APPEALS OF NEW YORK, 1902.

[171 *New York* 538.]

PARKER, Ch. J.[1] The complaint alleges that the Franklin Mills Co., one of the defendants, was engaged in a general milling business and in the manufacture and sale of flour; that before the commencement of the action, without the knowledge or consent of plaintiff, defendants, knowing that they had no right or authority so to do, had obtained, made, printed, sold and circulated about 25,000 lithographic prints, photographs and likenesses of plaintiff, made in a manner particularly set up in the complaint; that upon the paper upon which the likenesses were printed and above the portrait there were printed, in large, plain letters, the words, "Flour of the Family," and below the portrait in large capital letters, "Franklin Mills Flour," and in the lower right-hand corner in smaller capital letters, "Rochester Folding Box Co., Rochester, N. Y.;" that upon the same sheet were other advertisements of the flour of the Franklin Mills Co.; that those 25,000 likenesses of the plaintiff thus ornamented have been conspicuously posted and displayed in stores, warehouses, saloons and other public places; that they have been recognized by friends of the plaintiff and other people with the result that plaintiff has been greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement and her good name has been attacked, causing her great distress and suffering both in body and mind; that she was made sick and suffered a severe nervous shock, was confined to her bed and compelled to employ a physician, because of these facts; that defendants had continued to print, make, use, sell and circulate the said lithographs, and that by reason of the foregoing facts plaintiff had suffered damages in the sum of $15,000. The complaint prays that defendants be enjoined from making, printing, publishing, circulating or using in any manner any likenesses of plaintiff in any form whatever, for further relief (which it is not necessary to consider here) and for damages.

It will be observed that there is no complaint made that plaintiff was

ably argued and fully considered, in which the Emperor of Austria as King of Hungary, obtained from the English Court of Chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary. *Austria* v. *Day*, 2 *Giff.* 628, and 3 *D. F. & J.* 217." *Per Gray, J.* in *Julliard* v. *Greenman* (1884) 110 *U. S.* 421, 447-448.

[1] The opening paragraphs of the opinion are omitted.

The student will doubtless recall the fact that the learned chief judge of the Court of Appeals was, in 1904, the Democratic candidate for the Presidency of the United States.

libeled by this publication of her portrait. The likeness is said to be a very good one, and one that her friends and acquaintances were able to recognize; indeed, her grievance is that a good portrait of her, and, therefore, one easily recognized, has been used to attract attention toward the paper upon which defendant mill company's advertisements appear. Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus, because of defendants' impertinence in using her picture without her consent for their own business purposes, she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes; but as it is distasteful to her, she seeks the aid of the courts to enjoin a further circulation of the lithographic prints containing her portrait made as alleged in the complaint, and as an incident thereto, to reimburse her for the damages to her feelings, which the complaint fixes at the sum of $15,000.

There is no precedent for such an action to be found in the decisions of this court; indeed the learned judge who wrote the very able and interesting opinion in the Appellate Division said, while upon the threshold of the discussion of the question: "It may be said in the first place that the theory upon which this action is predicated is new, at least in instance if not in principle, and that few precedents can be found to sustain the claim made by the plaintiff, if indeed it can be said that there are any authoritative cases establishing her right to recover in this action." Nevertheless, that court reached the conclusion that plaintiff had a good cause of action against defendants, in that defendants had invaded what is called a "right of privacy"—in other words, the right to be let alone. Mention of such a right is not to be found in Blackstone, Kent or any other of the great commentators upon the law, nor so far as the learning of counsel of the courts in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890, when it was presented with attractiveness and no inconsiderable ability in the Harvard Law Review (Vol. IV, page 193) in an article entitled, "The Right of Privacy."

The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. While most persons would much prefer to have a good likeness of themselves appear in a responsible periodical or leading newspaper rather than upon an advertising card or sheet, the doctrine which the courts are asked to create for this case would apply as well to the one publication as to the other, for the principle which a court of equity is asked to assert in

support of a recovery in this action is that the right of privacy exists and is enforceable in equity, and that the publication of that which purports to be a portrait of another person, even if obtained upon the street by an impertinent individual with a camera, will be restrained in equity on the ground that an individual has the right to prevent his features from becoming known to those outside of his circle of friends and acquaintances.

If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or habits. And were the right of privacy once legally asserted it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be in violation of such a right and with many persons would more seriously wound the feelings than would the publication of their picture. And so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to apply. I have gone only far enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief.

The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent. In such event no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute. The courts, however, being without authority to legislate, are required to decide cases upon principle, and so are necessarily embarrassed by precedents created by an extreme, and, therefore, unjustifiable application of an old principle.

The court below properly said that " while it may be true that the fact that no precedent can be found to sustain an action in any given case, is cogent evidence that a principle does not exist upon which the right may be based, it is not the rule that the want of a precedent is a sufficient reason for turning the plaintiff out of court," provided—I think should be added—there can be found a clear and unequivocal principle of the common law which either directly or mediately governs it or which by analogy or parity of reasoning ought to govern it.

It is undoubtedly true that in the early days of chancery jurisdiction

in England the chancellors were accustomed to deliver their judgments without regard to principles or precedents and in that way the process of building up the system of equity went on, the chancellor disregarding absolutely many established principles of the common law. "In no other way," says Pomeroy, "could the system of equity jurisprudence have been commenced and continued so as to arrive at its present proportions." (Pomeroy's Eq. Jur. § 48.) In their work the chancellors were guided not only by what they regarded as the eternal principles of absolute right, but also by their individual consciences, but after a time when "the period of infancy was passed and an orderly system of equitable principles, doctrines and rules began to be developed out of the increasing mass of precedents, this theory of a personal conscience was abandoned; and 'the conscience,' which is an element of the equitable jurisdiction, came to be regarded, and has so continued to the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines to which the court appeals, and by which it tests the conduct and rights of suitors—a juridical and not a personal conscience." (Pomeroy's Eq. Jur. § 57.)

The importance of observing the spirit of this rule cannot be overestimated, for, while justice in a given case may be worked out by a decision of the court according to the notions of right which govern the individual judge or body of judges comprising the court, the mischief which will finally result may be almost incalculable under our system which makes a decision in one case a precedent for decisions in all future cases which are akin to it in the essential facts.

So in a case like the one before us, which is concededly new to this court, it is important that the court should have in mind the effect upon future litigation and upon the development of the law which would necessarily result from a step so far outside of the beaten paths of both common law and equity, assuming—what I shall attempt to show in a moment—that the right of privacy as a legal doctrine enforceable in equity has not, down to this time, been established by decisions.

The history of the phrase "right of privacy" in this country seems to have begun in 1890 in a clever article in the Harvard Law Review—already referred to—in which a number of English cases were analyzed, and, reasoning by analogy, the conclusion was reached that—notwithstanding the unanimity of the courts in resting their decisions upon property rights in cases where publication is prevented by injunction—in reality such prevention was due to the necessity of affording protection to thoughts and sentiments expressed through the medium of writing, printing and the arts, which is like the right not to be assaulted or beaten; in other words, that the principle, actually involved though not always appreciated, was that of an inviolate personality, not that of private property.

This article brought forth a reply from the Northwestern Review

(Vol. III, page 1) urging that equity has no concern with the feelings of an individual or with considerations of moral fitness, except as the inconvenience or discomfort which the person may suffer is connected with the possession or enjoyment of property, and that the English authorities cited are consistent with such view. Those authorities are now to be examined in order that we may see whether they were intended to and did mark a departure from the established rule which had been enforced for generations; or, on the other hand, are entirely consistent with it.

The first case is *Prince Albert* v. *Strange* (1 Macn. & G. 25; 2 De G. & S. 652). The queen and the prince, having made etchings and drawings for their own amusement, decided to have copies struck off from the etched plates for presentation to friends and for their own use. The workman employed, however, printed some copies on his own account, which afterwards came into the hands of Strange, who purposed exhibiting them, and published a descriptive catalogue. Prince Albert applied for an injunction as to both exhibition and catalogue, and the vice-chancellor granted it, restraining defendant from publishing "at least by printing or writing, *though not by copy or resemblance,*" a description of the etchings. An examination of the opinion of the vice-chancellor discloses that he found two reasons for granting the injunction, namely, that the property rights of Prince Albert had been infringed, and that there was a breach of trust by the workman in retaining some impressions for himself. The opinion contained no hint whatever of a right of privacy separate and distinct from the right of property.

Pollard v. *Photographic Co.* (L. R. 40 Ch. Div. 345) is certainly not an authority for granting an injunction on the ground of threatened injury to the feelings, although it is true, as stated in the opinion of the Appellate Division, that the court did say in the course of the discussion that the right to grant an injunction does not depend upon the existence of property; but the decision was, in fact, placed upon the ground that there was a breach of an implied contract. The facts, briefly stated, were that a photographer had been applied to by a woman to take her photograph, she ordering a certain number of copies, as is usual in such cases. The photographer made copies for himself and undertook to exhibit them, and also sold copies to a stationer, who used them as Christmas cards. Their action was restrained by the court on the ground that there was an implied contract not to use the negative for any other purpose than to supply the sitter with copies of it for a price. During the argument of plaintiff's counsel, the court asked this question: "Do you dispute that if the negative likeness were taken on the sly, the person who took it might exhibit copies?" Counsel replied: "In that case there would be no consideration to support a contract."

In *Gee* v. *Pritchard* (2 Swanst. 402) B attempted to print a private letter written him by A, and he was restrained on the ground that the

property of that private letter remained in A, B having it only for the qualified purpose for which it was sent to him, the basis of the decision, therefore, being the idea of plaintiff's property in the thing published, as being the product of his mind, written by him and put into the hands of B for a limited purpose only.

The same judge, Lord ELDON, also granted the injunction in *Abernathy* v. *Hutchinson* (3 L. J. Ch. 209) restraining the publication in the "Lancet" of lectures delivered at a hospital by the plaintiff. The court expressed a doubt in that case whether there could be property in lectures which had not been reduced to writing, but granted the injunction on the ground that it was a breach of confidence on the part of a pupil who was admitted to hear the lectures to publish them, inasmuch as they were delivered for the information of the pupils and not for sale and profit by them.

Mayhall v. *Higbey* (1 H. & C. 188) was also a case where an injunction was granted and nominal damages awarded on the ground that plaintiff had a property right in certain photographic negatives which he had loaned to a person who, subsequently, became insolvent and whose assignee, without right, sold them to defendant who printed copies from them which he published and sold.

In *Duke of Queensberry* v. *Shebbeare* (2 Eden, 329) the Earl of Clarendon delivered to one Gwynne an original manuscript of his father's, "Lord Clarendon's History." Gwynne's administrator afterwards sold it to Shebbeare, and the court, upon the application of the personal representatives of Lord Clarendon, restrained its publication on the ground that they had a property right in the manuscript which it was not intended that Gwynne should have the benefit of by multiplying the number of copies in print for profit.

In not one of these cases, therefore, was it the basis of the decision that the defendants could be restrained from performing the act he was doing or threatening to do on the ground that the feelings of the plaintiff would be thereby injured; but, on the contrary, each decision was rested either upon the ground of breach of trust or that plaintiff had a property right in the subject of litigation which the court could protect.

A more recent English case, decided in 1898, is more nearly in point and negatives the contention that plaintiff may restrain an unauthorized publication which is offensive to him—namely, *Dockrell* v. *Dougall* (78 L. T. R. 840). In that case defendant, the owner of a medicine called "Sallyco," published the following substantially true but unauthorized statement about plaintiff: "Dr. Morgan Dockrell, physician to St. John's Hospital, London, is prescribing Sallyco as an habitual drink. Dr. Dockrell says nothing has done his gout so much good." In the course of the opinion the court said, in effect, that plaintiff claimed to be entitled to an injunction restraining defendant from using plaintiff's name in his advertisements on the ground that an injunction should be

granted in every such case where it can be shown that the use of the plaintiff's name is unauthorized and is calculated to injure him in his profession, and after saying that he did not think that this was right, he stated the proper rule to be that "In order that an injunction may issue to restrain a defendant from using a plaintiff's name the use of it must be such as to injure the plaintiff's reputation or property."

None of the other English cases brought to our attention are claimed to have a direct bearing upon this question, and it seems to us very clear that they do not in anywise support the position of plaintiff.

The case that seems to have been more relied upon than any other by the learned Appellate Division in reaching the conclusion that the complaint in this case states a cause of action, is *Schuyler* v. *Curtis* (147 N. Y. 434). In that case certain persons attempted to erect a statue or bust of a woman no longer living, and one of her relatives commenced an action in equity to restrain such erection, alleging that his feelings and the feelings of other relatives of deceased would be injured thereby. At Special Term an injunction was granted on that ground. (19 N. Y. Supp. 264.) The General Term affirmed the decision. (64 Hun, 594.) This court reversed the judgment, Judge PECKHAM writing, and so far as the decision is concerned, therefore, it is not authority for the existence of a right of privacy which entitles a party to restrain another from doing an act which, though not actionable at common law, occasions plaintiff mental distress. In the course of the argument, however, expressions were used which it is now claimed indicate that the court recognized the existence of such a right. A sufficient answer to that contention is to be found in the opinion written on the motion for reargument in *Colonial City Tr. Co.* v. *Kingston City R. R. Co.* (154 N. Y. 493) in which it was said: "It was not our intention to decide any case but the one before us. * * * If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the dicta of the writer of the opinion and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance." The question up for decision in the *Schuyler* case was whether the relatives could restrain the threatened action of defendants, and not whether Mrs. Schuyler could have restrained it had she been living. The latter question not being before the court it was not called upon to decide it, and, as we read the opinion, there is no expression in it which indicates an intention either to decide it or to seriously consider it, but rather, it proceeds upon the assumption that if such a right did exist in Mrs. Schuyler, her relatives did not succeed to it upon her death; all of which will sufficiently appear from the following extracts from the opinion:

"This action is of a nature somewhat unusual and dependent for its support upon the application of certain principles which are them-

selves not very clearly defined or their boundaries very well recognized or plainly laid down. Briefly described, the action is founded upon the alleged violation of *what is termed the right of privacy.*"

"It is not necessary, however, to the view which we take of this case, to lay down precise and accurate rules which shall apply to all cases touching upon this *alleged right.*"

"*For the purposes we have in view, it is unnecessary to wholly deny the existence of the right of privacy* to which the plaintiff appeals as the foundation of his cause of action."

"*While not assuming to decide what this right of privacy is in all cases,* we are quite clear that such a right would not be violated by the proposed action of the defendants."

There are two other cases in this state bearing upon this question: *Marks* v. *Jaffa* (26 N. Y. Supp. 908), decided at Special Term, and *Murray* v. *Gast Lithographic & Engraving Co.* (8 Misc. Rep. 36) decided at an Equity Term of the Court of Common Pleas at New York. In the first case the relief prayed for was granted upon the authority of the decision of the General Term in the *Schuyler* case, which was subsequently reversed in this court. In the *Murray* case, in a well-reasoned opinion by Judge BISCHOFF, it is held that a parent cannot maintain an action to enjoin an unauthorized publication of the portrait of an infant child, and for damages for injuries to his sensibilities caused by the invasion of his child's privacy, because "the law takes no cognizance of a sentimental injury, independent of a wrong to person or property." In the course of his opinion he quotes from the opinion of LUMPKIN, J., in *Chapman* v. *West. U. T. Co.* (88 Ga. 763) as follows: "The law protects the person and the purse. The person includes the reputation. The body, reputation and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But, outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings or the happiness of everyone by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain, without disturbance, any particular condition of feeling. The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries."

Outside of this jurisdiction the question seems to have been presented in two other cases in this country: *Corliss* v. *E. W. Walker Co.* (57 Fed. Rep. 434; 64 Fed. Rep. 280) and *Atkinson* v. *Doherty* (121 Mich.

372). The *Corliss* case was an action in equity to restrain the publication of the biography and picture of Mr. Corliss. It was based upon an alleged invasion of the right of privacy. The court denied the injunction as to the publication of the biography but granted it as to the use of certain plates from which the defendant was to make a picture of Mr. Corliss, upon the ground that they had been obtained upon conditions which defendant had not complied with. In the course of the opinion the court said: "Under our laws one can speak and publish what he desires, provided he commit no offense against public morals or private reputation. * * * There is another objection which meets us at the threshold of this case. The subject-matter of the jurisdiction of a court of equity is civil property, and injury to property, whether actual or prospective is the foundation on which its jurisdiction rests. (*Re Sawyer,* 124 U. S. 200, 210; Kerr. Inj. [2d ed.] p. 1.) It follows from this principle that a court of equity has no power to restrain a libelous publication." Both the opinion and the decision necessarily negative the existence of an actionable right of privacy; but subsequently upon a motion to dissolve the injunction, which was granted upon the ground that Mr. Corliss was a public character, and hence the publishers were entitled to use his picture, the learned court expressed the opinion that a private individual has the right to be protected from the publication of his portrait in any form. Now, while this suggestion was *obiter,* it merits discussion, and an examination of that which it promulgates as doctrine discloses what we deem a fatal objection to the establishment of a rule of privacy. The learned judge says: "I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right, and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's book by a clerk. * * * But, while the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual, just the same as a private manuscript, book or painting becomes (when not protected by copyright) public property by the act of publication. The distinction in the case of a picture or photograph lies, it seems to me, between public and private characters. A private individual should be protected against the publication of any portrait of himself, but where an individual becomes a public character the case is different. A statesman, author, artist or inventor, who asks for and desires public recognition, may be said to have surrendered his right to the public." This distinction between public and private characters cannot possibly be drawn. On what principle does an author or artist forfeit his right of privacy and a great orator, a great preacher, or a great advocate retain his? Who can draw a line of demarcation

between public characters and private characters, let that line be as wavering and irregular as you please? In the very case then before the judge, what had Mr. Corliss done by which he surrendered his right of privacy? In what respect did he by his inventions "ask for and desire public recognition" any more than a banker or merchant who prosecutes his calling? Or is the right of privacy the possession of mediocrity alone, which a person forfeits by giving rein to his ability, spurs to his industry or grandeur to his character? A lady may pass her life in domestic privacy when, by some act of heroism or self-sacrifice, her name and fame fill the public ear. Is she to forfeit by her good deed the right of privacy she previously possessed? These considerations suggest the answer we would make to the position of the learned judge and at the same time serve to make more clear what we have elsewhere attempted to point out, namely, the absolute impossibility of dealing with this subject save by legislative enactment, by which may be drawn arbitrary distinctions which no court should promulgate as a part of general jurisprudence.

Atkinson v. *Doherty* was a suit in equity brought by the widow of Colonel John Atkinson, a well-known lawyer in Detroit, to enjoin the defendant, a cigar manufacturer, from using the name and portrait of Colonel Atkinson upon boxes of cigars manufactured by defendant. The suit was dismissed by the Circuit Court, and its decree was unanimously affirmed by the Supreme Court. The case quite closely resembles the *Schuyler* case, which was brought to the attention of that court, and in the course of the opinion the contention that the *Schuyler* case intimated the existence of a right of privacy was met as follows: "We think it should not be considered as containing a *dictum* even in support of the doctrine contended for." The method adopted by the court in the *Atkinson* case in treating the question was different from that employed by this court in the *Schuyler* case, however, for the opinion proceeds to a review of the authorities upon which the right of privacy is said to rest, reaching the conclusion that all of the authorities which are entitled to respect are based upon property or contract rights, and hence "that Colonel Atkinson would himself be remediless were he alive, and the same is true of his friends who survive." The opinion concludes as follows: "This law of privacy seems to have gained a foothold at one time in the history of our jurisprudence—not by that name, it is true—but in effect. It is evidenced by the old maxim 'the greater the truth the greater the libel,' and the result has been the emphatic expression of public disapproval, by the emancipation of the press and the establishment of freedom of speech, and the abolition in most of the states of the maxim quoted by constitutional provisions. The limitations upon the exercise of these rights being the law of slander and libel, whereby the publication of an untruth that can be presumed or shown to the satisfaction, not of the plaintiff, but of others (*i. e.*, an impartial jury), to be injurious, not alone to the feelings, but to the reputation, is

actionable. Should it be thought that it is a hard rule that is applied in this case, it is only necessary to call attention to the fact that a ready remedy is to be found in legislation. We are not satisfied, however, that the rule is a hard one, and think that the concensus of opinion must be that the complainants contend for a much harder one. The law does not remedy all evils. It cannot, in the nature of things; and deliberation may well be used in considering the propriety of an innovation such as this case suggests. We do not wish to be understood as belittling the complaint. We have no reason to doubt the feeling of annoyance alleged. Indeed, we sympathize with it, and marvel at the impertinence which does not respect it. We can only say that it is one of the ills that under the law cannot be redressed."

An examination of the authorities leads us to the conclusion that the so-called "right of privacy" has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.

I do not say that, even under the existing law, in every case of the character of the one before us, or indeed in this case, a party whose likeness is circulated against his will is without remedy. By section 245 of the Penal Code any malicious publication by picture, effigy or sign which exposes a person to contempt, ridicule or obloquy is a libel, and it would constitute such at common law. Malicious in this definition means simply intentional and wilful. There are many articles, especially of medicine, whose character is such that using the picture of a person, particularly that of a woman, in connection with the advertisement of those articles might justly be found by a jury to cast ridicule or obloquy on the person whose picture was thus published. The manner or posture in which the person is portrayed might readily have a like effect. In such cases both a civil action and a criminal prosecution could be maintained. But there is no allegation in the complaint before us that this was the tendency of the publication complained of, and the absence of such an allegation is fatal to the maintenance of the action, treating it as one of libel. This case differs from an action brought for libelous words. In such case the alleged libel is stated in the complaint, and if the words are libelous *per se* it is unnecessary to charge that their effect exposes the plaintiff to disgrace, ridicule or obloquy. The law attributes to them that result. But where the libel is a picture which does not appear in the record, to make it libelous there must be a proper allegation as to its character.

The judgment of the Appellate Division and of the Special Term should be reversed and questions certified answered in the negative, without costs, and with leave to the plaintiff to serve an amended complaint within twenty days, also without costs.

GRAY, J. (dissenting). [The beginning of this opinion is omitted.] These defendants stand before the court, admitting that they have made,

published and circulated, without the knowledge or the authority of the plaintiff, 25,000 lithographic portraits of her, for the purpose of profit and gain to themselves; that these portraits have been conspicuously posted in stores, warehouses and saloons, in the vicinity of the plaintiff's residence and throughout the United States, as advertisements of their goods; that the effect has been to humiliate her and to render her ill and, yet, claiming that she makes out no cause of action. They say that no law on the statute books gives her a right of action and that her right to privacy is not an actionable right, at law or in equity.

Our consideration of the question thus presented has not been foreclosed by the decision in *Schuyler* v. *Curtis* (147 N. Y. 434). In that case, it appeared that the defendants were intending to make, and to exhibit, at the Columbian Exposition of 1893, a statue of Mrs. Schuyler, formerly Miss Mary M. Hamilton and conspicuous in her lifetime for her philanthropic work, to typify "Woman as the Philanthropist" and, as a companion piece, a statue of Miss Susan B. Anthony, to typify the "Representative Reformer." The plaintiff, in behalf of himself, as the nephew of Mrs. Schuyler, and of other immediate relatives, sought by the action to restrain them from carrying out their intentions as to the statue of Mrs. Schuyler; upon the grounds, in substance, that they were proceeding without his consent, (whose relationship was conceded to be such as to warrant such an action, if it were maintainable at all), or that of the other immediate members of the family; that their proceeding was disagreeable to him, because it would have been disagreeable and obnoxious to his aunt, if living, and that it was annoying to have Mrs. Schuyler's memory associated with principles, which Miss Susan B. Anthony typified and of which Mrs. Schuyler did not approve. His right to maintain the action was denied and the denial was expressly placed upon the ground that he, as a relative, did not represent any right of privacy which Mrs. Schuyler possessed in her lifetime and that, whatever her right had been in that respect, it died with her. The existence of the individual's right to be protected against the invasion of his privacy, if not actually affirmed in the opinion, was, very certainly, far from being denied. "It may be admitted," Judge PECKHAM observed, when delivering the opinion of the court, "that courts have power, in some cases, to enjoin the doing of an act, where the nature, or character, of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, *even though the existence of no property,* as that term is usually used, *is involved in the subject.*"

That the individual has a right to privacy, which he can enforce and which equity will protect against the invasion of, is a proposition which is not opposed by any decision in this court and which, in my opinion, is within the field of accepted legal principles. It is within the very case supposed by Judge PECKHAM in *Schuyler* v. *Curtis.* In the present case, we may not say that the plaintiff's complaint is fanciful, or that her

alleged injury is, purely, a sentimental one. Her objection to the defendants' acts is not one born of caprice; nor is it based upon the defendants' act being merely "distasteful" to her. We are bound to assume, and I find no difficulty in doing so, that the conspicuous display of her likeness, in various public places, has so humiliated her by the notoriety and by the public comments it has provoked, as to cause her distress and suffering, in body and in mind, and to confine her to her bed with illness.

If it were necessary, to be entitled to equitable relief, that the plaintiff's sufferings, by reason of the defendants' acts, should be serious, and appreciable by a pecuniary standard, clearly, we might well say, under the allegations of the complaint, that they were of such degree of gravity. However, I am not of the opinion that the gravity of the injury need be such as to be capable of being estimated by such a standard. If the right of privacy exists and this complaint makes out a case of its substantial violation, I think that the award of equitable relief, by way of an injunction, preventing the continuance of its invasion by the defendants, will not depend upon the complainant's ability to prove substantial pecuniary damages and, if the court finds the defendants' act to be without justification and for selfish gain and purposes, and to be of such a character, as is reasonably calculated to wound the feelings and to subject the plaintiff to the ridicule, or to the contempt of others, that her right to the preventive relief of equity will follow; without considering how far her sufferings may be measurable by a pecuniary standard.

The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. (Cooley on Torts, p. 29.) The principle is fundamental and essential in organized society that every one, in exercising a personal right and in the use of his property, shall respect the rights and properties of others. He must so conduct himself, in the enjoyment of the rights and privileges which belong to him as a member of society, as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his. When, as here, there is an alleged invasion of some personal right or privilege, the absence of exact precedent and the fact that early commentators upon the common law have no discussion upon the subject are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case, is not a fatal objection. (*Niagara Falls Int. Bridge Co.* v. *Great Western Ry. Co.*, 39 Barb. 212; *Sherman* v. *Skuse*, 166 N. Y. 352; *Hamilton* v. *Whitridge*, 11 Md. 145.) In the social evolution, with the march of the arts and sciences and in the resultant effects upon organized society, it is quite intelligible that new conditions must arise in personal relations, which the rules of the common law, cast in the rigid mould of an

earlier social status, were not designed to meet. It would be a reproach to equitable jurisprudence, if equity were powerless to extend the application of the principles of common law, or of natural justice, in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social, or commercial conditions. Sir Henry Maine, in his work on Ancient Law, has observed of equity, that it is an agency "by which law is brought into harmony with society," and that it is one of the factors, which operate in judicial evolution. It succeeds legal fictions, or those judicial assumptions, through which a rule of law is modified in its operation, and it precedes legislation. (See Maine's Ancient Law, pp. 22 to 28.) Equity has neither fixed boundaries, nor logical subdivisions and its origin, both in Rome and in England, was that there was a wrong for which there was no remedy at law. (See 1st Story Eq. Juris. secs. 49 and 50.) It supplements the deficiencies of the common law, by applying, where otherwise there would result a wrong, those principles of natural justice, which are analogous to settled principles of the common law. (See Story's Eq. Jur. sec. 671, note.) Lord Chancellor COTTENHAM observed, in *Wallworth* v. *Holt,* (4 Myl. & C. 619), "I think it is the duty of this court, (meaning equity), to adopt its practice and course of proceeding to the existing state of society and not, by a strict adherence to forms and rules, under different circumstances, to decline to administer justice and enforce rights for which there is no other remedy. * * * If it were necessary to go much further than it is, in opposition to some sanctioned opinions, in order to open the doors of this court to those who could not obtain it elsewhere, I should not shrink from the responsibility of doing so." As I have suggested, that the exercise of this peculiar preventive power of a court of equity is not found in some precisely analogous case, furnishes no valid objection, at all, to the assumption of jurisdiction, if the particular circumstances of the case show the performance, or the threatened performance, of an act by a defendant, which is wrongful, because constituting an invasion, in some novel form, of a right to something, which is, or should be conceded to be, the plaintiff's and as to which the law provides no adequate remedy. It would be a justifiable exercise of power, whether the principle of interference be rested upon analogy to some established common-law principle, or whether it is one of natural justice. In an article in the Harvard Law Review, of December 15th, 1890, which contains an impressive argument upon the subject of the "right of privacy," it was well said by the authors "that the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. * * * The right to life has come to mean the right to enjoy life—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession—intangible, as well as tangible."

Instantaneous photography is a modern invention and affords the means of securing a portraiture of an individual's face and form, *in invitum* their owner. While, so far forth as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. But, if it is to be permitted that the portraiture may be put to commercial, or other, uses for gain, by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences, than an actual bodily assault might be. Security of person is as necessary as the security of property; and for that complete personal security, which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society, there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity.

Such a view, as it seems to me, must have been unduly influenced by a failure to find precedents in analogous cases, or some declaration by the great commentators upon the law of a common-law principle which would, precisely, apply to and govern the action; without taking into consideration that, in the existing state of society, new conditions affecting the relations of persons demand the broader extension of those legal principles, which underlie the immunity of one's person from attack. I think that such a view is unduly restricted, too, by a search for some property, which has been invaded by the defendants' acts. Property is not, necessarily, the thing itself, which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and, so, it is called forth for the protection of the right to that which is one's exclusive possession, as a property right. It seems to me that the principle, which is applicable, is analogous to that upon which courts of equity have interfered to protect the right of privacy, in cases of private writings, or of other unpublished products of the mind. The writer, or the lecturer, has been protected in his right to a literary property in a letter, or a lecture, against its unauthorized publication; because it is property, to which the right of privacy attaches. (*Woolsey* v. *Judd,* 4 Duer, 399; *Gee* v. *Pritchard,* 2 Swanst. 402; *Abernathy* v. *Hutchinson,* 3 L. J. Ch. 209; *Folsom* v. *Marsh,* 2 Story, 100.) I think that this plaintiff has the same property in the right to be protected against the

use of her face for defendants' commercial purposes, as she would have, if they were publishing her literary compositions. The right would be conceded, if she had sat for her photograph; but if her face, or her portraiture, has a value, the value is hers exclusively; until the use be granted away to the public. Any other principle of decision, in my opinion, is as repugnant to equity as it is shocking to reason. Judge COLT, of the United States Court, in *Corliss* v. *Walker Co.,* (64 Fed. Rep. 280-5), a case involving the same question of an invasion of the right of privacy, with respect to the publication of a printed likeness of Mr. Corliss, expressed the opinion that "independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right, and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk." The case itself is not in point in its facts; because the complainant was the widow of Mr. Corliss and thus it came within the limitations of *Schuyler* v. *Curtis.*

The right to grant the injunction does not depend upon the existence of property, which one has in some contractual form. It depends upon the existence of property in any right which belongs to a person. In *Pollard* v. *Photographic Co.,* (40 Ch. Div. 345), it was held that the right to grant an injunction against selling copies of plaintiff's photographs did not depend upon the existence of property and that "it is quite clear that independently of any question as to the right at law, the Court of Chancery always had an original and independent jurisdiction to prevent what that court considered and treated as a wrong, whether arising from a violation of an unquestionable right, or from breach of confidence, or contract, as was pointed out by Lord COTTENHAM in *Prince Albert* v. *Strange,* (1 Macn. & G. 25)." In *Prince Albert* v. *Strange,* Lord Chancellor COTTENHAM sustained the issuance of an injunction, upon the ground that the right of privacy had been invaded by the publication and sale of etchings, made by Prince Albert and Queen Victoria. Upon the original hearing, Vice-Chancellor KNIGHT-BRUCE, in granting the injunction, observed that, "upon the principle of protecting property, it is that the common law, in cases not aided or prejudiced by statute, shelters the privacy and seclusion of thoughts and sentiments committed to writing, and desired by the author to remain not generally known."

It would be, in my opinion, an extraordinary view which, while conceding the right of a person to be protected against the unauthorized circulation of an unpublished lecture, letter, drawing, or other ideal property, yet, would deny the same protection to a person, whose portrait was unauthorizedly obtained, and made use of, for commercial purposes. The injury to the plaintiff is irreparable; because she cannot be wholly compensated in damages for the various consequences entailed by defendants'

acts. The only complete relief is an injunction restraining their continuance. Whether, as incidental to that equitable relief, she should be able to recover only nominal damages is not material; for the issuance of the injunction does not, in such a case, depend upon the amount of the damages in dollars and cents.

A careful consideration of the question presented upon this appeal leads me to the conclusion that the judgment appealed from should be affirmed.

O'BRIEN, CULLEN and WERNER, JJ., concur with PARKER, Ch. J.; BARTLETT and HAIGHT, JJ., concur with GRAY, J.

Judgment reversed, etc.[1]

PAVESICH *v.* NEW ENGLAND LIFE INS. CO.

IN THE SUPREME COURT OF GEORGIA, 1905.

[50 *Southeastern Reporter* 68.]

Paolo Pavesich brought an action against the New England Mutual Life Insurance Company, a nonresident corporation, Thomas B. Lumpkin, its general agent, and J. Q. Adams, a photographer, both residing in the city of Atlanta. The allegations of the petition were, in substance, as follows: In an issue of the Atlanta Constitution, a newspaper published in the city of Atlanta, there appeared a likeness of the plaintiff, which would be easily recognized by his friends and acquaintances, placed by the side of the likeness of an ill-dressed and sickly looking person. Above the likeness of the plaintiff were the words: "Do it now. The man who did." Above the likeness of the other person were the words: "Do it while you can. The man who didn't." Below the two pictures were the words: "These two pictures tell their own story." Under the plaintiff's picture the following appeared: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies."

[1] In accordance with Judge Parker's suggestion, the New York legislature, April 6, 1903, c. 132, sec. 2, provided: "Any person whose name, portrait or picture is used within this state for advertising purposes or for purposes of trade, without the written consent first obtained as above provided may maintain an equitable action in the Supreme Court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this act, the jury, in its discretion, may award exemplary damages."

Under the other person's picture was a statement to the effect that he had not taken insurance, and now realized his mistake. The statements were signed, "Thomas B. Lumpkin, General Agent." The picture of the plaintiff was taken from a negative obtained by the defendant Lumpkin, or some one by him authorized, from the defendant Adams, which was used with his consent, and with knowledge of the purpose for which it was to be used. The picture was made from the negative without the plaintiff's consent, at the instance of the defendant insurance company, through its agent, Lumpkin. Plaintiff is an artist by profession, and the publication is peculiarly offensive to him. The statement attributed to plaintiff in the publication is false and malicious. He never made any such statement, and has not, and never has had, a policy of life insurance with the defendant company. The publication is malicious, and tends to bring plaintiff into ridicule before the world, and especially with his friends and acquaintances, who know that he has no policy in the defendant company. The publication is a "trespass upon plaintiff's right of privacy, and was caused by breach of confidence and trust reposed" in the defendant Adams. The prayer was for damages in the sum of $25,000. The petition was demurred to generally, and specially on the grounds that there was a misjoinder of defendants and causes of action, that no facts were set forth from which malice can be inferred, and that no special damages were alleged. The court sustained the general demurrer, and the plaintiff excepted.

COBB, J.—The petition really contains two counts—one for a libel, and the other for a violation of the plaintiff's right of privacy. There was no special demurrer raising the objection that the counts were not properly arranged, as there was in Cooper *v.* Portner Brewing Company, 112 Ga. 894, 38 S. E. 91; and hence the petition is to be dealt with in relation to its substance, without reference to its form.

We will first deal with the general demurrer to the second count, which claimed damages on account of an alleged violation of the plaintiff's right of privacy. The question therefore to be determined is whether an individual has a right of privacy which he can enforce, and which the courts will protect against invasion. It is to be conceded that prior to 1890 every adjudicated case, both in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like, and that therefore a claim to a right of privacy, independent of a property, or contractual right, or some right of a similar nature, had, up to that time, never been recognized in terms in any decision. The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the courts to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the lawmaking power; but such absence, even for all time, is not conclusive of the question as to the existence of the right.

The novelty of the complaint is no objection, when an inquiry cognizable by law is shown to have been inflicted on the plaintiff. In such case, "although there be no precedent, the common law will judge according to the law of nature and the public good." Where the case is new in principle, the courts have no authority to give a remedy, no matter how great the grievance; but where the case is only new in instance, and the sole question is upon the application of a recognized principle to a new case, "it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago." Broom's Legal Maxims (8th Ed.) 193. This results from the application of the maxim, "Ubi jus ibi remedium," which finds expression in our Code, where it is declared that "for every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other." Civ. Code 1895, § 4929.

The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is necessarily to be presumed he has reserved, than he has to violate the valid regulations of the organized government under which he lives. The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. This idea is embraced in the Roman's conception of justice, which "was not simply the external legality of acts, but the accord of external acts with the precepts of the law, prompted by internal impulse and free volition." McKeldey's Roman Law (Dropsie) § 123. It may be said to arise out of those laws sometimes characterized as "immutable," "because they are natural, and so just at all times and in all places that no authority can either change or abolish them." 1 Domat's Civil Law by Strahan (Cushing's Ed.) p. 49. It is one of those rights referred to by some law writers as "absolute"—"such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." 1 Bl. 123. Among the absolute rights referred to by the commentator just cited is the right of personal security and the right of personal liberty. In the first is embraced a person's right to a "legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation"; and in the second is embraced "the power of locomotion, of changing situation, or

moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. 129, 134.

While neither Sir William Blackstone nor any of the other writers on the principles of the common law have referred in terms to the right of privacy, the illustrations given by them as to what would be a violation of the absolute rights of individuals are not to be taken as exhaustive, but the language should be allowed to include any instance of a violation of such rights which is clearly within the true meaning and intent of the words used to declare the principle. When the law guaranties to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe and exist. While, of course, the most flagrant violation of this right would be deprivation of life, yet life itself may be spared, and the enjoyment of life entirely destroyed. An individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor, or violate public law or policy. The right of personal security is not fully accorded by allowing an individual to go through life in possession of all of his members, and his body unmarred; nor is his right to personal liberty fully accorded by merely allowing him to remain out of jail, or free from other physical restraints. The liberty which he derives from natural law, and which is recognized by municipal law, embraces far more than freedom from physical restraint. The term "liberty" is not to be so dwarfed, "but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. 'Liberty,' in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." See Brannon on Fourteenth Amendment, 111. Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters, and of publicity as to others. One may wish to live a life of toil, where his work is of a nature that keeps him constantly before the public gaze, while another may wish to live a life of research and contemplation, only moving before the public at such times and under such circumstances as may be necessary to his actual existence. Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him this liberty. See, in this connection, Cyc. Law Dict. (Shumaker & Longsdorff), and Bouvier's Law Dict. tit. "Liberty." All will admit that the individual who desires to

live a life of seclusion cannot be compelled, against his consent, to exhibit his person in any public place, unless such exhibition is demanded by the law of the land. He may be required to come from his place of seclusion to perform public duties—to serve as a juror and to testify as a witness, and the like; but, when the public duty is once performed, if he exercises his liberty to go again into seclusion, no one can deny him the right. One who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze. Subject to the limitation above referred to, the body of a person cannot be put on exhibition at any time or at any place without his consent. The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance, and privacy in the other, are each guarantied. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy, and this is no new idea in Georgia law. In Wallace *v.* Railway Company, 94 Ga. 732, 22 S. E. 579, it was said: "Liberty of speech and of writing is secured by the Constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred." The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guarantied to persons in this state both by the Constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law.

While, in reaching the conclusion just stated, we have been deprived of the benefit of the light that would be shed on the question by decided cases and utterances of law writers directly dealing with the matter, we have been aided by many side lights in the law. The "injuria" of the Roman law, sometimes translated "injury," and at other times "outrage," and which is generally understood at this time to convey the idea of legal wrong, was held to embrace many acts resulting in damage for which the law would give redress. It embraced all of those wrongs which were the result of a direct invasion of the rights of the person and the rights of property which are enumerated in all of the commentaries on the common law, and which are so familiar to every one at this time. But it included more. An outrage was committed not only by striking with the fists or with the club or lash, but also by shouting until a crowd gathered around one, and it was an outrage or legal wrong to merely follow an honest woman or young boy or girl; and it was declared in unequivocal terms that these illustrations were not exhaustive, but that an injury or legal wrong was committed "by numberless other acts." Sandar's Just. (Hammond's Ed.) 499; Poste's Inst. of Gaius (3d Ed.) 449. The punishment of one who had not committed any assault

upon another, or impeded in any way his right of locomotion, but who merely attracted public attention to the other as he was passing along a public highway or standing upon his private grounds, evidences the fact that the ancient law recognized that a person had a legal right "to be let alone," so long as he was not interfering with the rights of other individuals or of the public. This idea has been carried into the common law, and appears from time to time in various places; a conspicuous instance being in the case of private nuisances resulting from noise which interferes with one's enjoyment of his home, and this, too, where the noise is the result of the carrying on of a lawful occupation. Even in such cases where the noise is unnecessary, or is made at such times that one would have a right to quiet, the courts have interfered by injunction in behalf of the person complaining. See 2 Wood on Nuisances (3d Ed.) p. 827 et seq. It is true that these cases are generally based upon the ground that the noise is an invasion of a property right, but there is really no injury to the property, and the gist of the wrong is that the individual is disturbed in his right to have quiet. Under the Roman law, "to enter a man's house against his will, even to serve a summons, was regarded as an invasion of his privacy." Hunter's Roman Law (3d Ed.) p. 149. This conception is the foundation of the common-law maxim that "every man's house is his castle"; and in Semayne's Case, 5 Coke, 91, 1 Smith's Lead. Cas. 228, where this maxim was applied, one of the points resolved was "that the house of every one is to him as his castle and fortress, as well for his defense against injury and violence as for his repose." "Eavesdroppers, or such as listen under walls or windows or the eaves of a house to hearken after discourse, and thereupon to frame slanderous and mischievous tales," were a nuisance at common law, and indictable, and were required, in the discretion of the court, to find sureties for their good behavior. 4 Bl. 168. The offense consisted in lingering about dwelling houses and other places where persons meet for private intercourse, and listening to what is said, and then tattling it abroad. 10 Am. & Eng. Enc. L. (2d Ed.) 440. A common scold was at common law indictable as a public nuisance to her neighborhood. 4 Bl. 168. And the reason for the punishment of such a character was not the protection of any property right of her neighbors, but the fact that her conduct was a disturbance of their right to quiet and repose; the offense being complete even when the party indicted committed it upon her own premises. Instances might be multiplied where the common law has both tacitly and expressly recognized the right of an individual to repose and privacy. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, which is so fully protected both in the Constitutions of the United States and of this state (Civ. Code 1895, §§ 6017, 5713), is not a right created by these instruments, but is an ancient right, which, on account of its gross violation at different times, was preserved from such attacks in the future by being made the subject of

constitutional provisions. The right to search the papers or houses of another for the purpose of enforcing a claim of one individual against another is a civil proceeding, or in the maintenance of a mere private right, was never recognized at common law, but such search was confined entirely to cases of public prosecutions; and even in those cases the legality of the search was formerly doubted, and it has been said that it crept into the law by imperceptible practice. 25 Am. & Eng. Enc. L. (2d Ed.) 145. The refusal to allow such search as an aid to the assertion of a mere private right, and its allowance sparingly to aid in maintaining the rights of the public, is an implied recognition of the existence of a right of privacy, for the law on the subject of unreasonable searches cannot be based upon any other principle than the right of a person to be secure from invasion by the public into matters of a private nature, which can only be properly termed his right of privacy.

The right of privacy, however, like every other right that rests in the individual, may be waived by him, or by any one authorized by him, or by any one whom the law empowers to act in his behalf, provided the effect of his waiver will not be such as to bring before the public those matters of a purely private nature which express law or public policy demands shall be kept private. This waiver may be either express or implied, but the existence of the waiver carries with it the right to an invasion of privacy only to such an extent as may be legitimately necessary and proper in dealing with the matter which has brought about the waiver. It may be waived for one purpose, and still asserted for another; it may be waived in behalf of one class, and retained as against another class; it may be waived as to one individual, and retained as against all other persons. The most striking illustration of a waiver is where one either seeks or allows himself to be presented as a candidate for public office. He thereby waives any right to restrain or impede the public in any proper investigation into the conduct of his private life which may throw light upon his qualifications for the office, or the advisability of imposing upon him the public trust which the office carries. But even in this case the waiver does not extend into those matters and transactions of private life which are wholly foreign, and can throw no light whatever upon the question as to his competency for the office, or the propriety of bestowing it upon him. One who holds public office makes a waiver of a similar character—that is, that his life may be subjected at all times to the closest scrutiny in order to determine whether the rights of the public are safe in his hands—but beyond this the waiver does not extend. So it is in reference to those belonging to the learned professions, who by their calling place themselves before the public, and thereby consent that their private lives may be scrutinized for the purpose of determining whether it is to the interest of those whose patronage they seek to place their interests in their hands. In short, any person who engages in any pursuit or occupation or calling which calls for the approval or patronage of the public submits his pri-

vate life to examination by those to whom he addresses his call, to any extent that may be necessary to determine whether it is wise and proper and expedient to accord to him the approval or patronage which he seeks.

It may be said that to establish a liberty of privacy would involve in numerous cases the perplexing question to determine where this liberty ended, and the rights of others and of the public began. This affords no reason for not recognizing the liberty of privacy, and giving to the person aggrieved legal redress against the wrongdoer, in a case where it is clearly shown that a legal wrong has been done. It may be that there will arise many cases which lie near the border line which marks the right of privacy, on the one hand, and the right of another individual or of the public, on the other. But this is true in regard to numerous other rights which the law recognizes as resting in the individual. In regard to cases that may arise under the right of privacy, as in cases that arise under other rights where the line of demarkation is to be determined, the safeguard of the individual, on the one hand, and of the public, on the other, is the wisdom and integrity of the judiciary. Each person has a liberty of privacy, and every other person has, as against him, liberty in reference to other matters, and the line where these liberties impinge upon each other may in a given case be hard to define; but that such a case may arise can afford no more reason for denying to one his liberty of privacy than it would to deny to another his liberty, whatever it may be. In every action for a tort it is necessary for the court to determine whether the right claimed has a legal existence, and for the jury to determine whether such right has been invaded, and to assess the damages if their finding is in favor of the plaintiff. This burden which rests upon the court in every case of the character referred to is all that will be imposed upon it in actions brought for a violation of the right of privacy. No greater difficulties will be encountered in such cases in determining the existence of the right than often will be encountered in determining the existence of other rights sought to be enforced by action. The courts may proceed in cases involving the violation of a right of privacy as in other cases of a similar nature, and the juries may in the same manner proceed to a determination of those questions which the law requires to be submitted for their consideration. With honest and fearless trial judges to pass in the first instance upon the question of law as to the existence of the right in each case, whose decisions are subject to review by the court of last resort, and with fair and impartial juries to pass upon the questions of fact involved, and assess the damages in the event of a recovery, whose verdict is, under our law, in all cases subject to supervision and scrutiny by the trial judge, within the limits of a legal discretion, there need be no more fear that the right of privacy will be the occasion of unjustifiable litigation, oppression, or wrong than that the existence of many other rights in the law would bring about such results.

The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition. But it must be kept within its proper limits, and in its exercise must be made to accord with the rights of those who have other liberties, as well as the rights of any person who may be properly interested in the matters which are claimed to be of purely private concern. Publicity in many cases is absolutely essential to the welfare of the public. Privacy in other matters is not only essential to the welfare of the individual, but also to the well-being of society. The law stamping the unbreakable seal of privacy upon communications between husband and wife, attorney and client, and similar provisions of the law, is a recognition not only of the right of privacy, but that, for the public good, some matters of private concern are not to be made public, even with the consent of those interested.

It therefore follows from what has been said that a violation of the right of privacy is a direct invasion of a legal right of the individual. It is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover. Civ. Code 1895, § 3807. In an action for an invasion of such right the damages to be recovered are those for which the law authorizes a recovery in torts of that character, and, if the law authorizes a recovery of damages for wounded feelings in other torts of a similar nature, such damages would be recoverable in an action for a violation of this right.

The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right would inevitably tend to curtail the liberty of speech and of the press. The right to speak and the right of privacy have been coexistent. Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other. The right to convey one's thoughts by writing or printing grows out of, but does not enlarge in any way, the natural right of speech. It simply authorizes one to take advantage of those mediums of expression which the ingenuity of man has contrived for broadening and making more effective the influences of that which was formerly confined to mere oral utterances. The right to speak and write and print has been at different times in the world's history seriously invaded by those who, for their own selfish purposes, desired to take away from others such privileges, and consequently these rights have been made the subject of provisions in the Constitutions of the United States and of this state. The Constitution of the United States prohibits Congress from passing any law "abridging the freedom of speech or of the press." Civ. Code 1895, § 6014. The constitution of this state declares, "No law shall ever be passed to curtail or restrain the liberty of speech or of the press." Civ. Code 1895, § 5712. Judge Cooley says: "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected

against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested *by* such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted." Cool. Con. Lim. (5th Ed.) p. 521. In Rex v. St. Asaph, 3 Term Rep. 428, Lord Mansfield said: "The liberty of the press consists in printing without any previous license, subject to the consequence of law." Chancellor Kent, while Judge of the Supreme Court of New York, in People *v.* Croswell, 3 Johns. Cas. 336, 394, adopted as a definition of the phrase "liberty of the press" what was said by General Hamilton in his brief in that case, where it was set forth that "the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals"; and the learned jurist declared that this definition was perfectly correct, comprehensive and accurate. Mr. Justice Story defined the phrase to mean "that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so, always, that he does not injure any other person in his rights, person, property, or reputation, and so, always, that he does not thereby disturb the public peace or attempt to subvert the government." Story, Const. § 1880. See, also, 18 Am. & Eng. Enc. Law (2d Ed.) 1125.

The constitution of this state declares what is meant by "liberty of speech" and "liberty of the press" in the following words: "Any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Civ. Code 1895, § 5712. The right preserved and guarantied against invasion by the Constitution is therefore the right to utter, to write, and to print one's sentiments, subject only to the limitation that in so doing he shall not be guilty of an abuse of this privilege, by invading the legal rights of others. The Constitution uses the word "sentiments," but it is used in the sense of thoughts, ideas, opinions. To make intelligent, forceful, and effective an expression of opinion, it may be necessary to refer to the life, conduct, and character of a person; and, so long as the truth is adhered to, the right of privacy of another cannot be said to have been invaded by one who speaks or writes or prints, provided the reference to such person, and the manner in which he is referred to, is reasonably and legitimately proper in an expression of opinion on the subject that is under investigation. It will therefore be seen that the right of privacy must in some

particulars yield to the right of speech and of the press. It is well recognized that slander is an abuse of the liberty of speech, and that a libel is an abuse of the liberty to write and print, but it is nowhere expressly declared in the law that these are the only abuses of such rights. And that the law makes the truth in suits for slander and in prosecutions and suits for libel a complete defense may not necessarily make the publication of the truth the legal right of every person, nor prevent it from being in some cases a legal wrong. The truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest. The truth may be uttered and printed in reference to the life, character, and conduct of individuals whenever it is necessary to the full exercise of the right to express one's sentiments on any and all subjects that may be proper matter for discussion. But there may arise cases where the speaking or printing of the truth might be considered an abuse of the liberty of speech and of the press, as in a case where matters of purely private concern, wholly foreign to a legitimate expression of opinion on the subject under discussion, are injected into the discussion for no other purpose and with no other motive than to annoy and harass the individual referred to. Such cases might be of rare occurrence, but, if such should arise, the party aggrieved may not be without a remedy. The right of privacy is unquestionably limited by the right to speak and print. It may be said that to give liberty of speech and of the press such wide scope as has been indicated would impose a very serious limitation upon the right of privacy, but, if it does, it is due to the fact that the law considers that the welfare of the public is better subserved by maintaining the liberty of speech and of the press than by allowing an individual to assert his right of privacy in such a way as to interfere with the free expression of one's sentiments, and the publication of every matter in which the public may be legitimately interested. In many cases the law required the individual to surrender some of his natural and private rights for the benefit of the public, and this is true in reference to some phases of the right of privacy as well as other legal rights. Those to whom the right to speak and write and print is guarantied must not abuse this right, nor must one in whom the right of privacy exists abuse this right. The law will no more permit an abuse by the one than by the other. Liberty of speech and of the press is and has been a useful instrument to keep the individual within limits of lawful, decent, and proper conduct; and the right of privacy may be well used within its proper limits to keep those who speak and write and print within the legitimate bounds of the constitutional guaranties of such rights. One may be used as a check upon the other, but neither can be lawfully used for the other's destruction.[1]

As we have already said, cases may arise where it is difficult to de-

[1] That part of the opinion which reviews the American decisions on the question has been omitted.

termine on which side of the line of demarkation which separates the right of privacy from the well-established rights of others they are to be found; but we have little difficulty in arriving at the conclusion that the present case is one in which it has been established that the right of privacy has been invaded, and invaded by one who cannot claim exemption under the constitutional guaranties of freedom of speech and of the press. The form and features of the plaintiff are his own. The defendant insurance company and its agent had no more authority to display them in public for the purpose of advertising the business in which they were engaged than they would have had to compel the plaintiff to place himself upon exhibition for this purpose. The latter procedure would have been unauthorized and unjustifiable, as every one will admit, and the former was equally an invasion of the rights of his person. Nothing appears from which it is to be inferred that the plaintiff has waived his right to determine himself where his picture should be displayed in favor of the advertising right of the defendants. The mere fact that he is an artist does not of itself establish a waiver of this right, so that his picture might be used for advertising purposes. If he displayed in public his works as an artist, he would, of course, subject his works and his character as an artist, and possibly his character and conduct as a man, to such scrutiny and criticism as would be legitimate and proper to determine whether he was entitled to rank as an artist, and should be accorded recognition as such by the public. But it is by no means clear that even this would have authorized the publication of his picture. The constitutional right to speak and print does not necessarily carry with it the right to reproduce the form and features of man. The plaintiff was in no sense a public character, even if a different rule in regard to the publication of one's picture should be applied to such characters. It is not necessary in this case to hold—nor are we prepared to do so—that the mere fact that a man has become what is called a public character, either by aspiring to public office, or by holding public office, or by exercising a profession which places him before the public, or by engaging in a business which has necessarily a public nature, gives to every one the right to print and circulate his picture. To use the language of Hooker, J., in Atkinson *v.* Doherty, *supra:* "We are loath to believe that the man who makes himself useful to mankind surrenders any right to privacy thereby, or that, because he permits his picture to be published by one person and for one purpose, he is forever thereafter precluded from enjoying any of his rights." It may be that the aspirant for public office, or one in official position, impliedly consents that the public may gaze not only upon him but upon his picture, but we are not prepared now to hold that even this is true. It would seem to us that even the President of the United States, in the lofty position which he occupies, has some rights in reference to matters of this kind which he does not forfeit by aspiring to or accepting the highest office within the gift of the people of the several states. While no person who has ever held this position,

and probably no person who has ever held public office, has even objected or ever will object to the reproduction of his picture in reputable newspapers, magazines, and periodicals, still it cannot be that the mere fact that a man aspires to public office or holds public office subjects him to the humiliation and mortification of having his picture displayed in places where he would never go to be gazed upon, at times when and under circumstances where if he were personally present the sensibilities of his nature would be severely shocked. If one's picture may be used by another for advertising purposes, it may be reproduced and exhibited anywhere. If it may be used in a newspaper, it may be used on a poster or a placard. It may be posted upon the walls of private dwellings or upon the streets. It may ornament the bar of the saloon keeper or decorate the walls of a brothel. By becoming a member of society, neither man nor woman can be presumed to have consented to such uses of the impression of their faces and features upon paper or upon canvas. The conclusion reached by us seems to be so thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law, and so thoroughly in harmony with those principles as molded under the influence of American institutions, that it seems strange to us that not only four of the judges of one of the most distinguished and learned courts of the Union, but also lawyers of learning and ability, have found an insurmountable stumbling block in the path that leads to a recognition of the right which would give to persons like the plaintiff in this case and the young woman in the Roberson Case redress for the legal wrong, or what is by some of the law writers called the outrage, perpetrated by the unauthorized use of their pictures for advertising purposes.

What we have ruled cannot be in any sense construed as an abridgment of the liberty of speech and of the press as guarantied in the Constitution. Whether the reproduction of a likeness of another which is free from caricature can in any sense be declared to be an exercise of the right to publish one's sentiments, certain it is that one who merely for advertising purposes, and from mercenary motives, publishes the likeness of another without his consent, cannot be said, in so doing, to have exercised the right to publish his sentiments. The publication of a good likeness of another, accompanying a libelous article, would give a right of action. The publication of a caricature is generally, if not always, a libel. Whether the right to print a good likeness of another is an incident to a right to express one's sentiments in reference to a subject with which the person whose likeness is published is connected, is a question upon which we cannot, under the present record, make any authoritative decision; but it would seem that a holding that the publication of a likeness under such circumstances without the consent of the person whose likeness is published is allowable would be giving to the word "sentiment" a very extended meaning. The use of a pen portrait might be allowable in some cases where the use of an actual

portrait was not permissible. There is in the publication of one's picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guaranties to a person the right to publish his sentiments on any subject. Such conduct is not embraced within the liberty to print, but is a serious invasion of one's right of privacy, and may in many cases, according to the circumstances of the publication and the uses to which it is put, cause damages to flow which are irreparable in their nature. The knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and if a man of true instincts, or even ordinary sensibilities, no one can be more conscious of his enthrallment than he is.

So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability, just as in the present day we stand amazed that Lord Coke should have combated with all the force of his vigorous nature the proposition that the court of chancery had jurisdiction to entertain an application for injunction to restrain the enforcement of a common-law judgment which had been obtained by fraud, and that Lord Hale, with perfect composure of manner and complete satisfaction of soul, imposed the death penalty for witchcraft upon ignorant and harmless women.[1]

[1] It will be observed that this is a case at law for damages, but if privacy be established as an existing legal right, Equity will recognize and give effect in an appropriate case to any violation of the right where damages at law would be inadequate, for, in the language of the maxim, Equity follows the law.

Lack of space has compelled the omission of the authorities cited and discussed by the learned judge in the course of his elaborate and convincing opinion. For these the student is referred to the original report.

JOAN, QUEEN OF ENGLAND, *v.* BISHOP.

IN CHANCERY, BEFORE LORD CHANCELLOR STAFFORD, 1432-1438.

[1 *Calendars of the Proceedings in Chancery* xxiii.]

To the very reverend Father in God the Bishop of Bath, Chancellor of England,

JOAN, Queen of England, sheweth and complaineth of Robert Bishop, Walter Coty, and John Turgeys, That whereas Henry, late King of England her husband, whom God assoil, by his letters patent of the 4th day of June, in the fourth year of his reign, granted and gave to the said suppliant the manor of Gillingham, with the appurtenances in the County of Dorset, to have and to hold, in the name of dower; the which manor is ancient demesne of the crown, and hath such custom used from all time whereof memory runneth not, that all men of native condition, who are willing to come and dwell within the same manor, shall be received to dwell there freely and peaceably, without claim or impeachment of their bodies, land, tenements, goods, or chattels of any one. There came the said Robert, Walter, and John, with force and arms, that is to say, with swords, bucklers, bows, and arrows, armed and arrayed to make war, into the said manor, on Saturday next before the feast of St. Katherine last past, and the close of one Ralph Palmer broke, and there made an assault on one Nichol Newport, nief of the abbess of Wilton, then being in the service of the said Ralph, and the said Nichol then took and led away out of the franchise of the said manor, against the peace, and in contempt of our Lord the King, to the damage of the said Queen of 100 *l.* May it please your Lordship to grant several writs under certain penalties by you to be limited, [to compel the said Robert, Walter, and John] to appear before you in chancery at the quinzime of Easter next ensuing, to answer as well to our Lord the King, as to the said Queen, of the matter aforesaid.

Pledges to prosecute { John Bugge. / John Faryngton.[1]

[1] For a discussion of the early criminal jurisdiction exercised by the Court of Chancery, see 1 Spence Jurisdiction of the Court of Chancery Pt. 2, B. 1, c. 4; Pt. 2, B. 4, c. 2; Kerly, History of Equity 71; Palgrave, The King's Council § xii; and an article by Edwin S. Mack, 16 Harvard Law Review 389.

In an earlier case, *Alyngton, Sheriff* v. *Sibill et al* (temp. Henry V.) 2 Calends *c.* the defendants had rescued from the plaintiff, and his posse, certain parties, held by the sheriff under a writ issued in a case of trespass. The bill alleged the beating, wounding, and ill-treatment of one of the posse "so that he was and yet is in despair of his life." The bill concluded, "Please your very gracious lordship to consider the great riot and rebellion made in this

HOLDERSTAFFE *v.* SAUNDERS.

KING'S BENCH, 1704.

[6 *Modern* 16.]

HOOPER, *Serjeant*, moved for an *attachment* against AN ATTORNEY and some others, who had got one in quiet possession turned out, thus:

He got one to come upon the land, who assumed the name of the *tenant in possession*, and owned himself to be the man, and got the *common affidavit* of service to him by the borrowed name, as *tenant in possession*, having delivered a declaration to him before, and thereupon got judgment against the *casual ejector*, and turned the tenant, who was wholly ignorant of all, out of possession.

Upon affidavit of this matter, all the accomplices were ordered to attend; for though the Court looked upon it as a very great offence, they would not at first grant *an attachment;* but said, that it being in a criminal matter, if endeavours were used to serve them with the rule, and they could not be found, upon affidavit of that matter, they would grant *an attachment*, without requiring personal service.

HOOPER, *Serjeant*, then insisted to have it part of the rule, that they should not move for *an injunction* in chancery in the mean time, for that would hinder the further inquiry of this practice.

But THE COURT said, they could not do that, for that would be to send an *injunction* into chancery; but they said, that when the Court had a hank over a man, and he came for a favour to the Court, they often refuse to grant him that, without he consented not to go into chancery; and that if after such consent he would go, they would send *an attachment* against him for a contempt.

And HOLT, *Chief Justice*, said, Surely chancery will not grant an injunction in a criminal matter under examination in this court; and that if they did, this Court would break it, and protect any that would proceed in contempt of it: and he said, he thought that copies of these affidavits upon which the rule was made here, and an oath of their being true copies, ought to be ground sufficient to stay the chancery from granting an injunction.

behalf, in contempt of our soverign lord the King and in subversion of his law, and thereupon to cause the said William Sibill, John Webbe, and Robert Repham to come before you in the chancery of our said lord the King and thereupon to inflict due punishment, remedy, and redress, according as the law demands, for God and in the work of Charity."

THE MAYOR AND CORPORATION OF YORK *v.* SIR LIONEL PILKINGTON.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1742.

[2 *Atkyns* 302.]

The plaintiffs claim the sole right of fishing in the river Ouse; the defendant claims the right likewise; a bill and cross bill were brought, to establish their several rights.

While these suits were depending, the plaintiffs caused the agent of the defendant to be indicted at York sessions, where they themselves are judges, for a breach of the peace, in fishing in their liberty.

A motion was made on behalf of the defendant, to stop the prosecution.

LORD CHANCELLOR. This court has not originally, and strictly, any restraining power over criminal prosecutions; and, in this case, if the defendant had applied to the Attorney-General, he would have granted a *noli prosequi.*

For when a complaint is grounded on a civil right, for which an action of trespass would lie, the Attorney-General of course grants a *noli prosequi.*

This is a complaint merely for fishing in the river, without any actual breach of the peace, which the mayor and corporation say, is a trespass upon them.

If it could be made to appear at law, that the plaintiffs were both judges and parties, it might come out to be *coram non judice,* but it might be difficult to make out this.

If actions of trespass had been brought *vi et armis,* this court would have stopped them; but though I cannot grant an injunction, yet I may certainly make an order upon the prosecutors to prevent the proceeding on the indictment.

Supposing it was a suit for a right of land where entries had been made, and the bill was brought to quiet the possession, and after that they prefer an indictment for a forcible entry, which is of a double nature, as it partakes of a breach of the peace, and is also a civil right, this court would certainly stop the proceedings upon such indictment.

Where parties submit their right to the court, they have certainly a jurisdiction, and may interpose.

Therefore I will make an order to restrain the plaintiffs from proceeding at the sessions, till the hearing of the cause and further order.[1]

[1] "Why ought a Court of Equity to interfere with the ordinary proceedings of a criminal court? I am not aware that any such power exists. The point came before me in Saull *v.* Browne (Law Rep. 10 Ch. 64), where I declined to

TURNER *v.* TURNER.

IN CHANCERY, BEFORE LORD CRANWORTH, V. C., 1851.

[15 *Jurist* 218.]

In this case a suit had been instituted for the administration of the estate of William Turner, deceased, and in the course of it a receiver had been appointed, and an injunction had been issued restraining the defendants William Stephens Meryweather and Mary Ann his wife from carrying on actions of ejectment for the recovery of any part of the lands and hereditaments of the said William Turner. Part of the lands and hereditaments consisted of an old mansion-house, near Plaistow; and by an order made in this cause on the 7th May, 1850, it was ordered, that the receiver should be at liberty to pull down the mansion-house and dispose of the materials. The receiver accordingly, on the 29th May, sent a solicitor, accompanied by a builder and workmen, to pull the house down. On arriving at it they found a woman in possession, who stated that she had been placed therein by the defendant William Stephens Meryweather, and who refused to open the door. The solicitor thereupon pushed open the door and entered with the workmen: the house was pulled down and the materials sold, and the produce accounted for in the receiver's account. William Stephens Meryweather had since preferred a bill of indictment against the solicitor, builder, and workmen, for forcibly entering and expelling him from the said mansion-house. One of the parties to the suit now presented a petition, praying that William Stephens Meryweather might be restrained from prosecuting this indictment.

Rolt and *Prior,* in support of the petition, cited *York* v. *Pilkington* (2 Atk. 302) and *The Attorney-General* v. *Cleaver,* (18 Ves. 220).

Henniker (*Bethell* with him, absent) opposed.—This Court never interferes to restrain criminal proceedings. (*Holdernesse* v. *Saunders,* 6 Mod. 19; *Montagu* v. *Dudman,* 2 Ves. 292). At all events, costs cannot be given against us.

Hardy, for other parties.

LORD CRANWORTH, V. C.—I shall certainly make an order restraining Mr. Meryweather from prosecuting the indictment. The distinction is

interfere with criminal proceedings or to follow Lord Hardwicke's doubtful decision in Mayor of York *v.* Pilkington (2 Atk. 302).

"My decision was appealed from, and the Lord Justices thought it a right decision. With the exception of that case before Lord Hardwicke, there is no instance in which a Court of Equity has interfered in criminal proceedings. I do not say that the court might not interfere in a possible case, but as a general rule it will not." JESSEL, M. R., in Kerr *v.* Corporation of Preston, 1877, 6 Ch. Div. 463, 467.

very intelligible; this Court has no jurisdiction over an indictment in general, as over a mere civil proceeding, but this is merely with reference to its own jurisdiction. If the Court makes an order to which all parties consent, or by which all parties must be considered as bound, and then any party chooses to obstruct the parties executing it, the Court will certainly prevent him from proceeding against the officer of the Court for doing that which he would have been punished by the Court for not doing. I shall not make an injunction under the seal of the Court but an order restraining Mr. Meryweather from prosecuting this indictment. The costs of all parties except Mr. Meryweather to come out of the estate.[1]

SAULL *v.* BROWNE.

IN THE COURT OF APPEAL, 1874.

[*Law Reports,* 10 *Chancery Appeals* 64.]

SARAH SAULL, the executrix of Thomas Saull, filed the bill in this suit against her co-executor, William Saull, and Browne and Godfrey, two other persons who were partners with the executors in a wine and spirit business. The bill alleged divers acts of misconduct on the part of Browne and Godfrey, and that, acting in collusion, they had formed a scheme for transferring the business so as to injure the plaintiff; and the bill prayed for a sale of the partnership property, and for accounts, and for payment of all profits made, and compensation for losses occasioned by the removal of the business to another place of business. The defendants answered in January, 1873.

On the 13th of November, 1874, Sarah Saull obtained from the Police Court at Worship Street a summons against Browne and God-

[1]See *Crighto* v. *Dalsmor* (1893) 21 L. R. A. (Miss.) 84; *Attorney Gen.* v. *Cleaver* (1811) 18 Ves. 211.

"It is when the parties sought to be enjoined, have as plaintiffs, submitted themselves to the Court by a bill in Equity as to the matter or right affected by or involved in the criminal procedure that Equity has jurisdiction." *Per Billings J.,* in *Spink* v. *Francis* (1884) 19 *Fed.* 670.

"When a suit in equity is pending and one of the parties thereto institutes a criminal proceeding in a Court of Law, or before a magistrate, which is of the same nature as the civil proceeding, then the Court of Chancery has jurisdiction to make an order restraining the party from prosecuting the criminal proceeding; and this on the ground that the other party to the suit in Chancery ought not to be twice harassed by a suit in respect of the same proceeding." *Per Seymour Thompson* in 18 *Am. Law Rev.* 599, 601.

frey, for unlawfully conspiring to defraud her of her just share in the partnership business.

An application was then made to the Master of the Rolls on behalf of Browne and Godfrey for leave to give short notice of motion to restrain the proceedings on the summons; but the Master of the Rolls thought he should have no jurisdiction to make the order, and refused leave.

The motion was now, by leave, made before the Court of Appeal.

Lord Cairns L. C.[1] I should be unwilling to express any doubt that there may be cases in which criminal proceedings instituted by a party to a suit in this court are so identical with the civil proceedings as to induce this court to order that the same person shall not at the same time pursue his remedy in this court and pursue another remedy which ranges itself under the head of criminal jurisdiction. No doubt there may be such a case, and the authorities which have been referred to, when properly understood, entirely come under the description which I have given.

In the present case the bill was filed by a plaintiff alleging various matters as to a partnership with the defendants, and asking for the interference of the court for the protection of the property of the partnership. I make no observation as to the prospects of success in this suit: with that I have now nothing to do, and as to that of course I know nothing. But I find that the same plaintiff has taken out a summons before a police magistrate against the defendants, or some of them, alleging that they have entered into a conspiracy, and in the course of it have injured the plaintiff as to the partnership property. That summons is based entirely upon criminal proceedings, and the object is to obtain the punishment of the persons charged with the conspiracy. It appears to me that the thing which is sought by this summons is different from anything which could be obtained in this court. No doubt the criminal court may have to consider the question of property, but the object of the summons is not to obtain relief as to the property, but to obtain punishment for the defendants in their persons.

We put it to the defendants' counsel whether, if before the suit was commenced a summons of this kind had been taken out, this court could interfere with the proceedings, and it was admitted that the court could not interfere. So also it cannot be doubted that, after relief has been given by this court in this suit, a criminal court might be applied to, and the punishment of the defendants might be obtained.

[1] "Cairns was confessedly the first lawyer of his time; his especial characteristic was lucidity. Without any great parade of case law, he would exhaust the argument from principle and only in conclusion illustrate it by citing a few decisions. As a judge he did not explain the process by which his mind had been persuaded, but adhered to strict reasoning, his mind working like a logical machine." Dictionary National Biography, Article Cairns.

If, then, such proceedings might be taken either before or after the suit, it is difficult to see why they should not be taken at the same time and concurrently with the suit. There is no inconsistency in allowing both proceedings, as nothing which takes place on the summons can be evidence in the suit.

It would be in the discretion of the magistrate whether to hear the case or not; but that is for his discretion, not for ours. Or, if the summons should result in an indictment, it will be for the Attorney-General to consider whether such a proceeding ought to be allowed to go on; but that, again, rests in his discretion, not in ours.

There is no authority for us to make such an order, and the motion must be dismissed with costs.

SIR W. M. JAMES, L. J.[1] I am of the same opinion. In old times this court might well have been asked to interfere with criminal proceedings taken against an officer of the court for the purpose of harassing him, as he had no other sufficient protection. There is an old decision referred to in the note to Francklyn *v.* Colhoun, 3 *Sw.* 276, 280, *n.* that resisting and killing a sequestrator was not murder. At that time, therefore, the court had cause to interfere with criminal proceedings, but the cause for so doing has now ceased. The authority produced to us, Mayor of York *v.* Pilkington, 2 *Atk.* 302 is, as far as I know, the only case in which this court has made such an order as we are now asked to make; and even that case is not exactly similar, because it appears that the same right would there have been tried in both courts.

SIR G. MELLISH, L.J.[2] I am of the same opinion. The power of this court to interfere with a criminal proceeding can only arise when the criminal proceeding is of the same nature as the civil proceeding. The only case cited was of that nature, but here the proceedings are quite different, and this court is not called upon to interfere.[3]

[1] "He was a most eminent judge, exceptionally learned, shrewd and strong, and gifted with a great power of terse and clear enunciation of principles. The court of appeals under him and Lord Justice Mellish was a very efficient court." Dictionary National Biography, article James.

[2] "The experiment of appointing a common law practitioner to so important a post in chancery was bold, but it was justified by its success and the court, which consisted of him and Lord Justice James, continued for some years to give judgments of the highest importance and value. * * * His chief judicial fault was an eager habit of controversially interrupting the arguments by counsel, but his learning was profound, his intellect logical and clear, and his character impartial and amiable." Dictionary National Biography, article Mellish.

[3] "The fact that the jurisdiction of a court of equity is exclusively civil is due partly to the manner of its establishment and in part to the complexion of English jurisprudence at the time when the early chancellors first began to issue writs under the great seal of the king and to try causes. To the Court of King's Bench the king had already allotted a supreme original jurisdiction formerly exercised by the aula regis or court of the king. Cromp-

OCEAN CITY ASSOCIATION *v.* SCHURCH.

In the Court of Chancery of New Jersey, 1898.

[57 *New Jersey Equity* 268.]

Grey, V. C.

The complainant in this bill is a corporation of this state which has sold land at Ocean City to a person under whom the defendant has possession by a deed containing a restrictive covenant to the effect that "no business of any kind whatever shall be carried on upon the said premises upon the Lord's day," &c. By the deeds passing the title by successive steps to the defendant's landlord, this and other restrictions were notified to the grantees, and by them accepted. The bill alleges that the defendant, for pay, delivers bathing suits and permits the use of bath-

ton King's Bench and Common Pleas, Int., p. xxvi. The jurisdiction of a court of equity consisted of that portion of the king's prerogative which he had not delegated to his judges by writ. Langdell's Summary of Equity Pleading, p. 28. When, therefore, a court of equity was asked to enjoin a criminal proceeding, it was confronted with a peculiar situation. By a fiction of the law the king was deemed to be so much a party to a criminal cause that a non-suit could not be entered, but the prosecutor must enter a nolle prosequi, 1 Bl. Com. 269, 270. It was but natural that the result should be reached that equity would not interfere where the petition amounted in substance to a prayer that the king's chancellor frustrate the operation of the king's justice. It is true that at one time in the history of English law the chancellors were vested with criminal jurisdiction. This, however, was the result of the inability or actual unwillingness of the magistrates to protect against the oppression of the feudal barons, and was statutory in its origin. 4 Hen. VII. c. 12 sec. 2. Spence Equity Jurisdiction, Vol. 1. p. 343 and notes." 2 *Columbia Law Rev.* 550.

So usually a Court of Equity will not enjoin a criminal proceeding; Kerr *v.* Corporation of Preston (1876) *L. R.* 6 *Ch. Div.* 466; but when property would otherwise be ruined, an injunction has been granted, as when the plaintiff ought to enjoin arrests of his workmen under a Sunday law. Manhattan Iron Works *v.* French (1882) 12 Abb. N. C. 446; and see accord Barlow *v.* Vestry (1883) 48 Law Times N. S. 348; Wood *v.* City of Brooklyn (1852) 14 Barb. 425; there equity is without power to decide the guilt or innocence of a party. See Davis *v.* American Society (1878) 75 *N. Y.* 362.

"It is further insisted that the action in equity authorized by the statute cannot be maintained, because the legislature has no power to enforce a criminal law by a civil action. But "on maintaining a nuisance may not only be punished in a criminal proceeding, but a civil action at law to recover damages in a proper case, and an action in equity to restrain the nuisance, may be prosecuted against him. Richards *v.* Holt, 61 Iowa, 529; Ewell *v.* Greenwood, 26 Id., 377. These cases were decided without any reference to a statute ex-

houses on the demised property upon the Lord's day in breach of the covenant, and prays that he may be enjoined from such breaches.

The complainant insists that it is entitled to special consideration in its effort to restrain a breach of this covenant, because it is seeking to enforce the observance of the religious obligations to keep the Sabbath holy, and its application is in aid of the prohibitions of the Vice and Immorality acts, against the doing of business on Sunday.

This court will aid by its remedies in the enforcement of all lawful covenants where the applicants appear to have an equitable right to their use. But it cannot excuse from the obligation of diligent application because the remedy sought, would if granted, enforce a religious duty, whether of a Christian or a Hebrew.

So far as the complainant seeks the aid of this court because the acts of the defendant are obnoxious to the Vice and Immorality acts and in the nature of a crime, there is the highest authority for the refusal to allow an injunction simply to prevent the commission of a crime. Lord Eldon, in *Gee* v. *Pritchard,* 2 *Swanst.* 413, declared that the court had no

pressly authorizing an action in equity, in addition to criminal punishment. It ought not to be claimed that a statute is unconstitutional which merely provides a remedy which was available without the statute. And it must be remembered that the defendant is not convicted and punished for a crime by the injunction. It belongs to that class of remedies which may properly be provided by statute to aid in the administration of preventive justice. It stays the arm of the wrong-doer. It does not seek to punish him for any past violations of the law. Its purpose is to prevent a public offense, and suppress what the law declares to be a nuisance. The denial of a trial by jury is not as oppressive to the party charged, as the statute requiring a person who threatens to commit a public offense to give bonds with sureties to keep the peace towards the people of the state, and, in default of giving the bond, committing him to prison. Code, §§ 4115-4119. So far as we are advised, no one has ever claimed that the law requiring security to keep the peace was a denial of the right of trial by jury.

"The defendant, in order to succeed in the defense that the proceeding by injunction is an attempt to enforce a criminal law by civil process, demands, in effect, that the courts must establish the principle that, because the nuisance complained of is a crime, it is entitled to favor and protection in a court of equity. Such rule would not command the respect or approval of any one.

"There are many adjudged cases, aside from those above cited, which expressly hold that the fact that a nuisance is a crime, and punishable as such, does not deprive equity of its jurisdiction to restrain and abate it by injunction. People *v.* City of St. Louis, 5 Gillman, (Ill.) 351; Attorney-general *v.* Railroad Co., 3 Greene, (N. J.,) Eq., 136; Attorney-general *v.* Hunter, 1 Dev. Eq., 12; Hinke *v.* Hopeman, 87 Ill., 450. And this rule applied to actions by private individuals, and to suits for the benefit and in behalf of the public."—*Per Rothrock, J.,* in Littleton *v.* Fritz (1885) 65 *Iowa* 488, 494.

The cases generally are in accord. See them collected in a note in 1 *Amcs Cases in Equity Jurisdiction* 35.

jurisdiction to prevent the commission of crimes. This does not deny the preventive jurisdiction of this court to protect property from a threatened act which, if completed, would give a right of action. *Emperor of Austria* v. *Kossuth*, 3 *De G., F. & J.* 240. But if the act to be restrained constitutes a crime only, and is not destructive of property nor of a character which will result in pecuniary damage, an injunction will not be allowed. It is quite obvious, therefore, that the supposed criminal phase of the acts of the defendant cannot be considered by this court as a ground for equitable relief. If the furnishing the means for a Sunday bath is the conducting of business obnoxious to the criminal law, that law affords remedies quite as immediate in their restraint upon the criminal as is the process of this court. This relief has always been at hand and may yet be invoked without liability to the reply that the prosecutor has by delay acquiesced in the wrongdoing.

It may be suggested that the affording the opportunity for a Sunday bath is within the exception in the Vice and Immorality acts, that it is a work of necessity or of charity, but this is a matter which must be left to the determination of another court.

The stated breaches of the covenant do not appear to inflict any pecuniary loss upon the complainant, nor has their public persistent character heretofore led the complainant to apply for a restraint. As a preliminary injunction might be the cause of great pecuniary loss to the defendant, I see no sufficient reason to change the situation, pending the suit, from that in which the complainant has for some years been content to leave it.

I will advise an order dismissing the order to show cause and the *ad interim* restraint.[1]

[1] As to the obsolete criminal jurisdiction of the Court of Chancery, see 1 *Spence Eq. Juris.* 342, 685.

"Prior, to the reign of Richard II and long after the chancellor entertained jurisdiction to restrain persons from committing *quasi* criminal offenses and acts of violence. But it was always averred that by reason of combination or the power of the party threatening or doing a wrong act, he had power to prevent or pervert the administration of justice in the common law courts. But when the state of society became more settled this jurisdiction was abandoned and has never since been claimed or exercised." *Per Mr. Justice Walker* in *Staurt* v. *Logan Co.* (1876) 83 *Ill.* 341; see *Moses* v. *Mayor et al.* (1875) 52 *Ala.* 198. The Chancellor also at one time punished perjury committed in his court. See 1 *Spencer Eq. Jurisdiction* 691, and cases cited.

LITTLETON *v.* BURGESS.

IN THE SUPREME COURT OF WYOMING, 1905.

[82 *Pacific Reporter* 864.[1]]

VAN ORSDEL, J., delivered the opinion of the court:

This is an injunction proceeding brought in the district court of Sheridan county by the plaintiff in error against the defendant in error for the purpose of restraining the latter, as prosecuting attorney of Sheridan county, from prosecuting the former for violations of the provisions of chapter 65, p. 68, Sess. Laws 1901, being an act prohibiting gambling within the State of Wyoming. Plaintiff, in his amended petition alleges, among other things, that, on the 28th day of July, 1904, he was granted licenses by the town of Sheridan, permitting him to conduct and carry on games of faro and roulette in a building occupied by him in said town; that said licenses were issued under and by virtue of an ordinance regularly enacted by the town council of said town; that the authority for the enactment of said ordinance is found in the provisions of a special charter granted by the legislature of the territory of Wyoming for the incorporation of said town, wherein, among other powers granted, the town is empowered and authorized "to levy and collect a license tax from billiard tables, bowling alleys, and other games and gaming tables"; that said provision of said charter was not repealed by said chapter 65, and is still in full force and effect; that, notwithstanding said licenses, the defendant, in the name of the State of Wyoming, filed three informations in the district court of Sheridan county charging plaintiff with violations of the provisions of said chapter 65; and that defendant threatened to file additional informations against plaintiff for each and every violation of said statute. It is further alleged in the petition that said chapter 65 is unconstitutional and void. Plaintiff prayed for a temporary restraining order enjoining the defendant from interfering with the plaintiff in carrying on, running or conducting the games of faro and roulette within the corporate limits of the town of Sheridan, and from causing further arrests of the plaintiff; and that at the final hearing said temporary injunction should be made permanent. Defendant demurred to the petition on the following grounds: "(1) That the said amended petition does not state facts sufficient to constitute a cause of action; (2) that this court has no jurisdiction of the subject of the action." The demurrer was sustained by the court, and, plaintiff refusing further to plead, judgment was entered dismissing the action and awarding costs to defendant, from which judgment plaintiff brings error to this court.

The principal question that confronts us, and one which we think is

[1] S. C. 2 L. R. A., N. S., 631.

decisive of this case, is whether a court of equity has jurisdiction to afford the relief sought by the plaintiff. The jurisdiction of a court of equity, unless expressly made so by statute, is limited to the protection of the rights of property. It has no jurisdiction over the prosecution of crimes. To assume such jurisdiction is to invade the dominion of the courts of law, and both the executive and administrative departments of government. Let us investigate for a moment where the contention of plaintiff, if sustained, would lead. The defendant is the prosecuting attorney of Sheridan county, charged with the duty of prosecuting within his county all infractions of the criminal laws of the State. He was proceeding under the provisions of a general statute of the State making gambling a crime, and prohibiting the same. Criminal prosecutions are conducted in Wyoming in the name of the State. The prosecuting officer is a mere agent of the State, which is the real plaintiff in every criminal proceeding. We have therefore in this case the strange anomaly of a court of equity being asked to issue an order of injunction to restrain the State from exercising one of its highest prerogatives in the maintenance of government. Courts of equity possess no such power. To hold that they do would be to invest them with power to restrain and paralyze the operation of the government itself in all its functions and departments. If a court of equity were to assume jurisdiction of the case at bar and try the issues involved, it would be equivalent to a trial of the criminal action here sought to be restrained. The guilt or innocence of the plaintiff would be the fundamental question for the court to determine, and, as bearing upon this feature of the case, the court would have to pass upon the constitutionality of the law under which the criminal proceedings were instituted, and the validity of the ordinance under which licenses were granted to the plaintiff. These are proper matters of defense in the criminal proceedings. Under our system of jurisprudence, criminal actions can only be tried by a jury, while the trial of actions in equity have always been reposed in the court, and have never been the proper subject of reference to a jury. Neither the criminal actions against the plaintiff nor the infirmities of the statute, if any there be, can be lawfully determined in this proceeding. 16 Am. & Eng. Enc. Law, p. 370, and cases there collected; Crighton *v.* Dahmer, 70 Miss. 602; 21 L. R. A. 84; 35 Am. St. Rep. 666; 13 So. 237; Suess *v.* Noble, 31 Fed. 855; Re Sawyer, 124 U. S. 200; 31 L. ed. 402; 8 Sup. Ct. Rep. 482; Portis *v.* Fall, 34 Ark. 375; High, Inj. § 68; Poyer *v.* Des Plaines, 123 Ill. 111, 5 Am. St. Rep. 494; 13 N. E. 819; Phillips *v.* Stone Mountain, 61 Ga. 386. In Suess *v.* Noble, *supra,* LOVE, District Judge, said: "Public offenses are prosecuted in England in the name of the King, and in the United States in the name of the State. It is manifest that neither the King nor the State could be made a defendant to a bill in equity. The restraining power of the court would be futile as against them; and it would avail nothing for the court to address its restraining process to public and private prosecutors, even if the power to do so existed, since the State would

constitute a contempt of court as punishable, not only for the contempt, but also for the assault.

But it is also urged that the law is invalid for the reason that it gives the right to bring the action to any citizen of the State. We think this objection was well answered in the case of Littleton *v.* Fritz, 65 Iowa, 488; 22 N. W. 641; 54 Am. Rep. 19 where the same point was made as to a similar statute. There the court say: "There can be no doubt that it is within the power of the Legislature to designate the person or class of persons who may maintain actions to restrain and abate public nuisances, and when that is done the action is for all purposes an action instituted in behalf of the public the same as though brought by the Attorney-General or public prosecutor. We are strongly inclined to think that in this case a decree for the defendant would be a bar to any other like action for an injunction upon evidence of sales of liquor within the same time as is embraced in this action. The plaintiff is by law made the representative of the public in bringing and maintaining the action." See, also, Carleton *v.* Rugg, 149 Mass. 550; 22 N. E. 55; 5. L. R. A. 193; 14 Am. St. Rep. 446; Mugler *v.* Kansas, 123 U. S. 623; 8 Sup. Ct. 273; 31 L. Ed. 205; State *v.* Crawford, 28 Kan. 726; 42 Am. Rep. 182.

It is also urged in argument in a somewhat indefinite way that the enjoining of crimes or public nuisances were unknown to the common law and that therefore the Legislature was without power to provide for such injunction. This involves the question whether the procedure provided for in the act is "due course of the law of the land." This question has been answered by the Supreme Court of the United States in the case of Mugler *v.* Kansas, 123 U. S. 623; 8 Sup. Ct. 273; 31 L. Ed. 205. There the court say: "Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice STORY says, 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. . . . In case of public nuisances, properly so called, an indictment lies to abate them and to punish the offenders. But an information, also, lies in equity to redress the grievance by way of injunction.' 2 Story's Eq. §§ 921, 922. The ground of this jurisdiction in cases of purprestures, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress; and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals or safety of the

community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury." If it be asserted that the procedure for the prevention of crime is novel and unknown to the common law, the answer is obvious. It seems that from the days of Edward the Confessor it was competent for any subject of the realm of England to cause any person to be brought before a magistrate, and to compel him to enter into an obligation with sureties to keep the peace, not only as against the complaining party, but also as against all persons in general. 4 Blackstone, Com. 251. Besides, the whole of title 3 of our Code of Criminal Procedure of 1895 is devoted to the means for the prevention of crime, and provides very much of the same remedies as were allowed at common law. Such being the facts, we fail to see that there is any peculiarity about the writ of injunction, or any peculiar sanctity about criminal or quasi criminal acts, which can debar the Legislature from providing that one may be enjoined by a suit in equity, from establishing a public nuisance such as a gaming house.

We deem it unnecessary to pursue this discussion further. The principal objections urged against the validity of the act have been fully and ably discussed in the cases of Mugler *v.* Kansas, Littleton *v.* Fritz, and Carleton *v.* Rugg, previously cited, and in all of which the validity of similar statutes was upheld. See, also, State *v.* Saunders, 66 N. H. 39, 35 Atl. 588; 18 L. R. A. 646, in which the main question is exhaustively discussed in an opinion characteristic of that eminent court. In this same case upon a writ of habeas corpus sued out by this relator before our Court of Criminal Appeals, 90 S. W. 492, that court maintained the constitutionality of the act in question and remanded the relator to the custody of the sheriff. That court within its jurisdiction is a court of equal dignity and authority with this court. Courts will not declare an act of the Legislature invalid as being in conflict with the Constitution unless it appear to them to be clearly so. For a stronger reason they should not so declare where the validity of the statute has been upheld by another court of last resort. In the application for the writ in this case the fact that a previous writ had been sued out from the Court of Criminal Appeals and that the relator had been remanded appears upon the face of the petition. An exception was interposed by the respondent upon the ground that under our statutes the relator was not entitled to a second writ of habeas corpus. A majority of the court are inclined to think the objection well taken; but to this proposition Mr. Justice WILLIAMS is not prepared to accede. The decision of the question not being necessary to a determination of the case, we express no opinion upon it.

The prisoner is remanded to the custody of the sheriff of McLennan County.

EX PARTE ALLISON.

In the Supreme Court of Texas, 1906.

[90 *Southwestern Reporter* 870.]

Gaines, C.J. This is a petition for the writ of habeas corpus, by which the relator seeks to have himself enlarged from the custody of the sheriff of McLennan county and restored to his liberty. It appears from the pleadings and exhibits in this court that one Minor Moore, a citizen of McLennan County, obtained from the judge of the Eighteenth judicial district a temporary writ of injunction against the relator, restraining him from the use of certain premises in the city of Waco for the purposes of gaming or of keeping and exhibiting games prohibited by law. By order of the judge granting the writ the petition was returned to one of the district courts of McLennan County and filed with the clerk thereof. Upon the final hearing in the latter court the injunction was made perpetual. Upon an affidavit filed by the plaintiff in the suit alleging that respondent had violated the injunction he was attached for contempt and upon the hearing was adjudged guilty and fined $100. Upon default of payment of the fine he was placed in the custody of the sheriff of the county, the respondent in the present suit.

The statute under which the original proceeding was instituted was passed by the regular session of the present Legislature, and we quote so much of it as we deem necessary for the purposes of this opinion:

"Section 1. The habitual use, actual, threatened, or contemplated use of any premises, place, building, or part thereof, for the purpose of gaming or of keeping or of exhibiting games prohibited by the laws of this State shall be enjoined at the suit either of the State or of any citizen thereof. Any person who may so use or who may be about to use or who may aid or abet any other person in the use of any premises, place or building, or part thereof, may be made a party defendant in such suit.

"Sec. 2. . . . And provided further, that nothing in the above proviso contained shall prevent such injunction from issuing at the suit of any citizen of this State who may sue in his own name, and such citizen shall not be required to show that he is personally injured by the acts complained of." Acts 1905, 29th Leg., p. 372, c. 153.

The validity of this statute is assailed by counsel for the relator upon several grounds; but we are of the opinion that none of them are well taken. The first question in logical order, as we think, is whether the caption of the act is sufficiently full to meet the requirements of section 35 of article 3 of our Constitution. The title in question is as follows: "An act to prevent by means of the writ of injunction at the suit of

the State or any citizen thereof the habitual use, actual, contemplated or threatened, of any premises, place, building or part thereof, for the purpose of gaming or of keeping or exhibiting games prohibited by the laws of this State." This title in our opinion very clearly and fully expresses the one subject of the act, and is therefore sufficient in that respect to sustain the statute.

It is also insisted on behalf of the relator that the Legislature has no power to confer upon the courts the authority to enjoin the commission of crime or the establishment or continuance of a public nuisance. The Legislature, when not restrained by the Constitution of the State or of that of the United States, has the power to make law and to provide remedies for its enforcement. We find no express provision in either of these instruments which prohibits the lawmaking from either extending or abridging equitable remedies. The main argument against the power the Legislature has attempted to exercise by the passage of the act in question is that it deprives the defendant in the action of the right of trial by jury, and therefore violates the provision of our Bill of Rights which declares that " the right of trial by jury shall remain inviolate." This may present a serious difficulty in those jurisdictions in which, as at common law, legal and equitable remedies were kept distinct and administered in separate courts. In courts of law the parties are entitled to have the issues of fact determined by a jury, which is not the case in a court of equity. Hence it might be that in such jurisdictions a statute which attempted to confer upon a court of equity the power to try a cause which was previously cognizable in a court of law would be held obnoxious to the objection that it deprived the parties of the right of trial by jury. But under our system, in which law and equity are blended and the right of trial by jury exists, whether the remedy be legal or equitable, the difficulty vanishes. Before the injunction could be made perpetual under the statute in question it is the right of the defendant to have the jury pass upon the facts. It is true that in case of a violation of the injunction there is in the contempt proceedings no trial by jury; but no such right exists at common law in proceedings for contempt. Hence that does not contravene the provision which declares that "the right of trial by jury shall remain inviolate." That provision merely protects the right as it existed at the time the Constitution went into effect.

Nor do we think that the act in question infringes that provision of the Bill of Rights which declares that "no person for the same offense, shall be twice put in jeopardy of life or liberty." It is true that, if he commits the act which he is enjoined from committing and such act be a violation of the penal laws of the State, he may under this statute be punished for the contempt and also for the violation of the criminal law. But these are not "the same offense." In the former case he is punished for a violation of the orders of the court; and in the latter for an offense "against the peace and dignity of the State." One who

makes an assault in the presence of the court in such a manner as to readily find other agents to represent it in the criminal proceeding. Courts of equity, therefore, deal only with civil and property rights. They have no jurisdiction to give relief in criminal cases, and they will not therefore interfere by injunction with the course of criminal justice." Mr. Justice GRAY, delivering the opinion in Re Sawyer, *supra,* said: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government."

It is contended, however, that equity will intervene to restrain a criminal prosecution under a void statute. Let it be conceded. But it will not try the validity of the statute, and will not interfere until the statute has been declared void in the proper legal tribunal. In Poyer *v.* Des Plaines, *supra,* the court said: "The questions arising in the prosecution sought to be enjoined can be determined in the tribunal in which they are pending, or in that to which they may be taken by appeal. The legality or illegality of the ordinance is purely a question of law, which the common law court is competent to decide. If the defendant is not guilty of violating this provision, as alleged, the determination of that fact is peculiarly within the province of that court. In either event, appellant had a full and complete defense at law." In the same case, it is further held: "If the municipal law be of doubtful validity, the complainant cannot, by his wilful and repeated violation of its provisions, each furnishing separate grounds for prosecution, and depending upon separate facts, create this ground for equitable interposition without first settling the validity of the ordinance in the courts of law. If he fears the prosecution of other suits, he can refrain from the repetition of his acts in violation of its provisions until the proper forum has determined its validity." In West *v.* New York, 10 Paige, 539, Chancellor WALWORTH, in delivering the opinion of the court, says: "The question as to the validity of the corporation ordinances does not properly belong to this court for decision, where the complainants, as in this case, have a perfect defense at law, if the ordinances are invalid, or if they do not render the complainants, or those in their employ, liable for the penalty. And it would be an usurpation of jurisdiction by this court if it should draw to itself the settlement of such questions, when their decision was not necessary in the discharge of the legitimate duties of the court." In Phillips *v.* Stone Mountain, *supra,* where it was sought to restrain the municipal authorities of the town of Stone Mountain, Georgia, from prosecuting the plaintiff for the violation of an ordinance requiring retail

liquor dealers to close their places of business during the continuance of divine services, and alleging the invalidity of the ordinance, the court said: "Injunctions or orders in the nature of injunction are not granted by courts of equity to restrain proceedings in criminal matters. . . . For this reason, whatever may be the infirmities of the penal ordinances of Stone Mountain, an injunction in the present case was properly denied. If unlawful convictions take place before a municipal court, reversal can be had in the superior court, as a court of law, by certiorari. (This is a plain and adequate remedy, and a court of equity need not and cannot interfere. Chancery takes no part in the administration of criminal law. It neither aids the criminal courts in the exercise of jurisdiction, nor restrains nor obstructs them." We are of the opinion that the plaintiff has a clear and adequate remedy at law, not only to have the question of his guilt or innocence determined, but also the validity of the statute upon which the informations are based.

It is contended that property rights are here involved; and that injunction will lie to restrain a criminal prosecution when necessary to protect such rights. In such cases equity intervenes, if at all, not in restraint of the criminal proceedings, but rather in aid of the civil jurisdiction of the court. It merely suspends the criminal proceedings until the property rights can be determined. It does not assume jurisdiction of the criminal action. It only prevents the criminal process from interfering with the exercise of its jurisdiction in the civil proceeding under consideration. The only right of the plaintiff affected is the enjoyment of the privileges afforded by the licenses. The permission granted by these licenses is not a property right. A license is a mere permit to do something that without it would be unlawful. It is not a contract, nor does it convey any vested right. It is issued in the exercise of the police power of the State, and may be modified, revoked, or continued at its pleasure. Statutes under which licenses have been granted, may be repealed, and it is held that such repeal is not any violation of the constitutional provision forbidding the enactment of laws impairing the obligations of contracts; nor does such repeal deprive the licensee of his property without due process of law. 17 Am. & Eng. Enc. Law, 2d ed. p. 262.

For the reasons above stated, the trial court committed no error in holding that the temporary injunction was improperly issued and in sustaining the demurrer and dismissing the action.

The judgment is affirmed.

POTTER, Ch.J., and BEARD, J., concur.

IN RE READ AND HUGGONSON

In Chancery, before Lord Chancellor Hardwicke, 1742.

[2 *Atkyns* 469.]

A motion against the Printer of the Champion, and the Printer of the *St. James's Evening Post;* that the former, who is already in the *Fleet,* may be committed close prisoner; and that the other, who is at large, may be committed to the *Fleet,* for publishing a libel against Mr. *Hall* and Mr. *Garden,* (executors of *John Roach,* Esq. late major of the garrison of *Fort St. George,* in the *East Indies*); and for reflecting likewise upon Governor *Mackray,* Governor *Pitt,* and others, taxing them with turning affidavit men, &c. in the cause now depending in this court, between Mrs. *Roach* and the executors: And insisting that the publishing such a paper is a high contempt of this court, for which they ought to be committed.

Lord Chancellor,

Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard.

It has always been my opinion, as well as the opinion of those who have sate here before me, that such a proceeding ought to be discountenanced.

But, to be sure, Mr. Solicitor General has put it upon the right footing, that notwithstanding this should be a libel, yet, unless it is a contempt of the court, I have no cognizance of it: For whether it is a libel against the public or private persons, the only method is to proceed at law.

The defendant's counsel have endeavoured two things: 1st, To show this paper does not contain defamatory matter. 2dly, If it does, yet there is no abuse upon the proceedings of this court, and therefore there is no room for me to interpose.

Now, take the whole together, though the latter is artfully penned, there can remain no doubt, in every common reader at a coffee-house, but this is a defamatory libel.

There are three different sorts of contempt.

One kind of contempt is, scandalizing the court itself.

There may be likewise a contempt of this court, in abusing parties who are concerned in causes here.

There may be also a contempt of this court, in prejudicing mankind against persons, before the cause is heard.

There cannot be any thing of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.

The case of *Rakes,* the Printer of the *Gloucester Journal,* who published a libel, in one of the *Journals,* against the commissioners of charitable uses at *Burford,* calling his advertisement, *A hue and cry after a Commission of Charitable Uses,* was of the same kind as this, and the court in that case committed him.

There are several other cases of this kind; one strong instance, where there was nothing reflecting upon the court, in the case of Captain *Perry,* who printed his brief before the cause came on; the offence did not consist in the printing, for any man may give a printed brief, as well as a written one, to counsel; but the contempt of this court, was prejudicing the world with regard to the merits of the cause before it was heard.

Upon the whole, there is no doubt, but this is a contempt of the court.[1]

If these printers had disclosed the name of the persons who brought this paper to them, there might have been something said in mitigation of their offence; but as they think proper to conceal it, I must order Mrs. *Read* to be committed to the *Fleet,* and *Huggonson* to be taken into close custody of the warden of the *Fleet.*

[1] Parts of the case, including a detailed discussion of the facts, have been omitted.

In the case of *Kitcat* v. *Sharp* (1882) *L. J.* 52 *Ch. Div.* 134, the plaintiff, a clergyman, had purchased shares of stock from the defendant, a stock broker. He filed his bill against the defendant, alleging false representations, and asking relief by rescission, or in the alternative damages. The defendant wrote the plaintiff a letter containing comments reflecting on the plaintiff's character. The defendant threatened to publish this, the plaintiff seeks an injunction.

FRY, J. "It appears to me that if the threat contained in the letter were carried into effect, it would be calculated to interfere with the fair trial of the action; it would be calculated to prejudice the plaintiff, and render it difficult for him to obtain justice if justice were on his side. That such a course of action is a contempt of court I cannot entertain the slightest doubt. So long ago as 1742 it was laid down by Lord Hardwicke, in a motion against the printers of The *Champion* and *St. James's Evening Post,* 2 *Atk. p.* 469 (*Case* 291), 'that nothing is more incumbent on courts of justice than to preserve their proceedings from being misrepresented, nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons, parties in causes, before the cause is finally heard.' Further down in the same case he said, 'There are three different sorts of contempt. One is scandalizing the court itself. There may be likewise contempt of court in abusing parties who are concerned in causes here. There may be also a contempt of this court in prejudicing mankind against persons before the cause is heard."

"It appears to me that the threatened act of the defendant would tend in this case to the two latter species of contempt. It is both abusing a party

BRANDRETH *v.* LANCE.

COURT OF CHANCERY OF NEW YORK, 1839.

[8 *Paige* 24.]

This case came before the court upon the demurrers of Lance and Hodges, two of the defendants, to the complainant's bill. The complainant was the proprietor and vender of a nostrum known by the name of "Brandreth's Vegetable Universal Pills." And, as the bill alleged, by advertising this medicine extensively in the public papers in the State of New York and elsewhere, and thus giving publicity to it and its general efficacy in the cure of diseases, the complainant had derived and was still deriving therefrom a comfortable support for himself and his family. The complainant also alleged that for the pur-

concerned and prejudicing mankind before the cause is heard. It appears to me, therefore, clearly that there would be contempt of court.

"If so, there arises the question whether I ought to stop that course of action, or whether the only proper course would be, as is contended by his counsel, to imprison him for contempt when committed. It appears to me I have plainly jurisdiction to prevent the threatened conduct. Only observe what would be the effect if I had not the jurisdiction. It would be that the court, seeing that a fair trial is likely to be interfered with by a contempt of court, would be powerless to prevent such contempt, and powerless to prevent the fair trial from being interfered with. It might be so because there might be a decision to that effect binding on me; but there is nothing of the sort; and in the next place nothing is more familiar than cases where the court does interfere to prevent a threatened contempt of court. The case to which Mr. Beaumont has referred, with respect to wards of court, is an exercise of that jurisdiction against persons not even parties to the action or cause. Lastly, if authority were wanted for the exercise of the jurisdiction in this very way, there is the case that has been cited of Coleman *v.* The West Hartlepool Railway Company, in which the Vice-Chancellor, Sir William Page Wood, restrained publication.

"Against that no single case has been brought, though Mr. Beaumont has argued the case with his usual ability and industry. I hold, therefore, that I have the jurisdiction and the obligation in the present case to restrain the publication."

And see the case of Dailey *v.* Superior Court (1896) 112 *Cal.* 94. The plaintiff here advertised, while the jury was being impanelled in the celebrated Durrant case, that he would produce at a certain theatre in San Francisco a play entitled "The Crime of a Century." The play was founded on the evidence brought out at Durrant's preliminary hearing. Durrant applied for and received an injunction. From this the petitioner here, defendant below, brought a writ of Certiorari. The upper court annuled the order, on the ground that it interfered with liberty of speech.

pose of vending his pills he had been in the habit of keeping various offices, and of employing many agents and clerks; that among others he had employed the defendant, Lance, but had been obliged to discharge him for improper conduct; that in consequence of being thus discharged, Lance became very much enraged and vowed revenge, and threatened to destroy the complainant; and that he thereupon opened a rival establishment for the purpose of vending medicine or pills in the city of New York. The complainant further charged in his bill, that a short time previous to the filing thereof he had been spoken to by the defendant Trust, and informed that Lance had applied to him to write the complainant's life, and that he was inclined to do so, but would relinquish the undertaking for a bonus of $50; that the complainant spurned the offer, and bade Trust not to presume to repeat such a proposition, and that shortly thereafter, and previous to the filing of the bill, the complainant received a printed sheet, enclosed to him in a letter, containing the title-page and preface and two other pages of a work or pamphlet entitled "The Life, Exploits, Comical Adventures and Amorous Intrigues of Benjamin Brandling, M.D. V.P.L.V.S., a distinguished pill vender, written by himself; interspersed with racy descriptions of scenes of life in London and New York"; which work, by the title-page, purported to be printed at New York, by D. M. Hodges, for the proprietors, and to be had of all the booksellers. The residue of this first sheet of the work, which was set out at length in the bill, contained a ludicrous preface in which the complainant was represented as avowing his object in raking up and publishing all the vices and follies of his youth, to be for the double purpose of amusing himself and as a warning to others to avoid them. And the table of contents represented him as being *filius nullius,* or rather as being *filius populi,* the child of many fathers, and as having passed through the various and successive grades of sailor, confectioner, painter, brass founder, peddler, jeweler, bagman to a pill vender, money broker, author, poet, and dramatist; until he had risen to the rank of a wholesale manufacturer of that rare medicine, upon which the smiles of fortune had been so freely bestowed. The complainant further charged that the before-mentioned book, or pamphlet, was then actually printing by the defendant, Hodges, for Lance, and under the direction and superintendence of the defendant, Trust, who was the author of the work; that the same, so far as appeared by the printed sheet set out in the bill, was a false, malicious, and highly injurious libel upon the complainant, and was intended to libel him and to bring him into public disgrace and contempt; although in the title-page the person whose life it purported to be was called Benjamin Brandling instead of Brandreth, his real name; and that the defendants were printing the work, and causing it to be printed for the purpose and with the intent of publishing the same and causing it to be widely distributed throughout the country. He therefore prayed for a perpetual injunction re-

straining the defendants from printing or publishing such book or pamphlet, or the contents thereof, or any part thereof; and that they might be decreed to deliver up the manuscript of the work, and all and every copy thereof, or of any part of the same printed by them, or either of them, to be cancelled and destroyed; and for such further or other relief as he might be entitled to in the premises. To this bill the defendants, Lance and Hodges, put in a separate demurrer, both as to the discovery and relief sought.

The CHANCELLOR [WALWORTH]. It is very evident that this court cannot assume jurisdiction of the case presented by the complainant's bill, or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which, as the legislature has decided, cannot safely be entrusted to any tribunal consistently with the principles of a free government. 2 *R. S.* 737, § 1, *and Revisers' note.* This bill presents the simple case of an application to the court of chancery to restrain the publication of a pamphlet which purports to be a literary work, undoubtedly a tale of fiction, on the ground that it is intended as a libel upon the complainant. The court of star chamber in England, once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages. *Hudson's Star Chamber,* 2 *Collect. Jurid.* 224. And as an incident to such a jurisdiction, that court was undoubtedly in the habit of restraining the publication of such libels by injunction. Since that court was abolished, however, I believe there is but one case upon record in which any court, either in this country or in England, has attempted, by an injunction or order of the court, to prohibit or restrain the publication of a libel, as such, in anticipation. In the case to which I allude, the notorious Scroggs, chief justice of the court of king's bench, and his associates, decided that they might be safely entrusted with the power of prohibiting and suppressing such publications as they might deem to be libellous. They accordingly made an order of the court prohibiting any person from printing or publishing a periodical, entitled "The Weekly Packet of Advice from Rome, or the History of Popery." The House of Commons, however, considered this extraordinary exercise of power on the part of Scroggs as a proper subject of impeachment. 8 *Howell's State Trials,* 198. And I believe no judge or chancellor from that time to the present has attempted to follow that precedent. There is, indeed, in the reported case of Du Bost *v.* Beresford, 2 *Camp. Rep.* 511, which was an action of trespass against the defendant for destroying a libellous picture, a most extraordinary declaration of Lord Ellenborough, that the Lord Chancellor, upon an application to him, would have granted an injunction against the exhibition of the libellous painting. It is said, however, in a note to Horne's case, in the state trials, that this declaration of Lord Ellenborough, in relation to the power of the Lord Chancellor to restrain the publication of a libel by injunction, ex-

cited great astonishment in the minds of all the practitioners in the courts of equity. 20 Howell's St. Tr. 799. It must unquestionably be considered as a hasty declaration, made without reflection during the progress of a trial at *nisi prius;* and as such it is not entitled to any weight whatever.

The utmost extent to which the court of chancery has ever gone in restraining any publication by injunction, has been upon the principle of protecting the rights of property. Upon this principle alone Lord Eldon placed his decision, in the case of Gee *v.* Pritchard, 2 Swanst. Rep. 403, continuing the injunction which restrained the defendant from publishing copies of certain letters written to him by the complainant. But it may, perhaps, be doubted whether his lordship in that case did not, to some extent, endanger the freedom of the press by assuming jurisdiction of the case as a matter of property merely, when in fact the object of the complainant's bill was not to prevent the publication of her letters on account of any supposed interest she had in them as literary property, but to restrain the publication of a private correspondence, as a matter of feeling only. His decision in that case has, however, as I see, received the unqualified approbation of the learned American commentator on equity jurisprudence. *See* 2 *Story's Eq.* 222, § 948.

In this case the complainant does not claim the exercise of the extraordinary jurisdiction of this court on the ground of any violation of the rights of literary property, or because a work is improperly attributed to him which will be likely to injure his reputation as an author, or even as a manufacturer of pills. For although his counsel insist that it must necessarily have the effect to injure the sale of his pills, he has not alleged in his bill that he even believes it will have any such effect. And in the absence of such an allegation, I am as a matter of opinion, inclined to the belief that with that class of persons who would be likely to buy and take his "universal pills," as a general remedy for any and every disease to which the human body is subject, the supposition that he was the author of the publication in question, and was also the extraordinary personage which this table of the contents of the work indicates, would be very likely to induce them to purchase and use his medicine the more readily.

As the publication of the work, therefore, which is sought to be restrained, cannot be considered as an invasion of the rights either of literary or medical property, although it is unquestionably intended as a gross libel upon the complainant personally, this court has no jurisdiction or authority to interfere for his protection. And if the defendants persist in their intention of giving this libellous production to the public, he must seek his remedy by a civil suit in a court of law; or by instituting a criminal prosecution, to the end that the libellers, upon conviction, may receive their appropriate punishment, in the penitentiary or otherwise.

The demurrers must be allowed, and the complainant's bill dismissed, as to these defendants, with costs.[1]

[1] "The jurisdiction of a Court of Chancery does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract. Huggonson's case, 2 Atk. 469, 488; Gee *v.* Pritchard, 2 Swanst. 402, 413; Seeley *v.* Fisher, 11 Sim. 581, 583; Fleming *v.* Newton, 1 H. L. Cas. 363, 371, 376; Emperor of Austria *v.* Day, 3 De G., F. & J. 217, 238-241; Mulkern *v.* Ward, L. R. 13 Eq. 619. The opinions of Vice-Chancellor Malins in Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551. In Dixon *v.* Holden, L. R. 7 Eq. 488, and in Rollins *v.* Hinks, L. R. 13 Eq. 355, appear to us to be so inconsistent with these authorities and with well-settled principles, that it would be superfluous to consider whether, upon the facts before him, his decisions can be supported.

"The jurisdiction to restrain the use of a name or a trade-mark, or the publication of letters, rests upon the ground of the plaintiff's property in his name, trade-mark or letters, and of the defendant's unlawful use thereof. Routh *v.* Webster, 10 Beav. 561; Leather Cloth Co. *v.* American Leather Cloth Co., 4 De G., J. & S. 137, and 11 H. L. Cas. 523; Maxwell *v.* Hogg, L. R. 2 Ch. 307, 310, 313; Gee *v.* Pritchard, 2 Swanst. 402.

"The present bill alleges no trust or contract between the parties, and no use by the defendants of the plaintiff's name; but only that the defendants made false and fraudulent representations, oral and written, that the articles manufactured by the plaintiff were infringements of letters patent of the defendant corporation, and that the plaintiff had been sued by the defendant corporation therefor; and that the defendants further threatened divers persons with suits for selling the plaintiff's goods, upon the false and fraudulent pretence that they infringed upon the patent of the defendant corporation. If the plaintiff has any remedy, it is by action at law. Barley *v.* Walford, 9 Q. B. 197; Wren *v.* Weild, L. R. 4 Q. B. 730." *Per Gray, C. J.*, in Boston Diatite Co. *v.* Florence Mfg. Co. (1873) 114 Mass. 69.

The American courts generally are in accord with Justice Gray's statement. The English law, while formerly as stated above, has since been changed by statute. Common Law Procedure Act (1854) §§ 79, 82; Supreme Court of Judicature Act (1873) § 25 (8). For the scope of the power of the Court under these provisions, see cases collected by Professor Lewis in his volume of cases, "Restraint of Infringement of Incorporal Rights," p. 382 *et seq.*

SECTION 2. MAXIMS OF EQUITY.[1]

A. *Equity Acts in Personam.*

JOHN HORSMONGER'S CASE.

IN CHANCERY, 1396-1403.

[*Select Cases in Chancery*, 10 *Selden Society, No.* 123.]

To the Chancellor of England,

Humbly beseecheth John Horsmonger that whereas one John Pecham enfeoffed Reginald Pympe and Walter Judde, amongst others, in certain lands and tenements in the County of Kent, upon certain conditions,

[1] "It must not be supposed that all these maxims are equally important, or that all have been equally fruitful in the development of doctrines and rules; but it is not an exaggeration to say that he who has grasped them all with a clear comprehension of their full meaning and effect has already obtained an insight into whatever is essential and distinctive in the system of equity jurisprudence, and has found the explanation of its peculiar doctrines and rules."—*Pomeroy*, 1 *Equity Jurisprudence*, § 336.

In closing a not overfriendly article on "The Use of Maxims in Jurisprudence," Professor Jeremiah Smith uses the following language: "What then is the conclusion of the whole matter? Shall we say that Mr. Broom's book should be burned by the common hangman; and that the citation of maxims in courts of justice should be forbidden by a legislative enactment framed upon the model of the statute passed in the early days of Kentucky, prohibiting the citation of English decisions. Far from it. On the contrary, Mr. Broom's excellent work should be in the library of every practitioner; and all lawyers should familiarize themselves with the leading maxims, which have the great merit of being "easily learned and not easily forgotten." But it should always be remembered that these familiar phrases are not all of equal value; that some ought to be amended, and others discarded altogether. Above all it should be remembered that these maxims (even the best of them) are only maxims; that they are "not meant to take the place of a digest;" that they are neither definitions nor treatises; that while they are "a convenient currency," yet "they require the test from time to time of careful analysis;" and that, in many instances, they are merely guide-posts pointing to the right road, but not the road itself."—9 *Harvard Law Review* 13, 26.

"A maxim is a proposition to be of all men confessed and granted without proofe, argument, or discourse." *Co. Litt.* 167 *a*.

In speaking of the maxim of the common law—*volenti non fit injuria*—Lord Esher, M. R. said in *Yarmouth* v. *France* (1887) *L. R.* 19 *Q. B. D.* 647, 653: "I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them."

amongst which it was contained that the wish of the said John Pecham was that when the said lands were sold he who should be the nearest of blood to the said John Pecham, to whom the heritage of the lands and tenements should descend, should have £40 to relieve his estate; which lands and tenements have now been sold by the said feoffees for 500 marks, which sum the said Reginald has in his keeping; And although the said suppliant, as kinsman and heir to the said John Pecham, that is to say, son of Thomas Horsmonger, son of Thomas Horsmonger, son of Agnes, late wife of Geoffrey Horsmonger and sister to Thomas Pecham, father of the said John Pecham, hath oftentimes requested the said Reginald to pay and deliver the said £40 to him, according to the wish of the said John Pecham; nevertheless he will not pay him a penny of it, to the great damage of the said suppliant: And so it is, most reverend [Lord], that the said suppliant cannot have any remedy in this behalf by the law of Holy Church, nor by the common law of the land: May it please your most gracious Lordship, in honour of God and on account of righteousness, to grant writs to cause the said Walter and Reginald to come before you in the King's Chancery, which is the Court of Conscience,[1] there to answer thereto as reason and conscience demand, otherwise the said suppliant is and will be without remedy, which God forfend.

Pledges for the prosecution { John Richelot of Kingston. William Hall of Surrey.

[1] "The word 'conscience' is used frequently. * * * Such expressions as 'conscience and law', 'the law of conscience', 'law and conscience', 'law and right', 'law, right, and good conscience', 'right and reason', 'reason and good faith', are common enough." Select Cases in Chancery, 10 Selden Society * * *

"In the use of the writs of *subpena* the chancery is not a court of record, for it is only to examine the conscience. We here are bound to the law and cannot go beyond. It belongs to them to examine the conscience. For when the deed is good and always has been so, their examination will not make it bad, nor will their examination make it good and legal in our law. And since the defendants cannot have any remedy by our law, they shall sue then to be restored to their obligation; and the effect of their power and decree is to restore the party to his obligation, or to compel the plaintiff to make an acquittance or release. But to execute this the Chancery can do nothing but order him to prison, there to remain until he will obey. And if the party will lie in prison rather than give up the obligation, the other is without remedy, and so the Chancellor has no power to nullify the obligation." *Per Pricot, C. J. in J. R.* v. *M. P.* (1459) *Y. B.* 37 *H. VI f.* 13, *pl.* 3, Common Bench, as printed by Mr Ames, Cases on Equity Jurisdiction 1.

"If after all this a man will still suppose there is a secret trust, security, or agreement between the parties to repurchase this rent, which no bill charges, no proof can make out, and the defendant denies upon oath, then it must be such a trust, security, or agreement as is only between a man and his confessor. With such a conscience as is only *naturalis et interna*, this court

GREAVES *v.* TOFIELD (1880), *L. R.* 14 *Ch. Div.* 563, 577. BRAMWELL, L. J.:—I also think that this appeal must be allowed. I think so with great doubt and the greatest reluctance, but it seems to me that the authorities are conclusive. I understand them to have established this beyond dispute, that if a man having an estate agrees to sell it, or undertakes to grant an interest in it, or a charge upon it, for a valuable consideration, and afterwards, disregarding the bargain he has made, conveys to a third person, or so deals with it by bargain with a third person, that he is incompetent to convey the estate or grant the interest to the first which he had agreed to do, and the third person has all along had notice of the first contract, the conscience of the second purchaser is affected, and he cannot retain the estate without giving the person who entered into the first contract that right in it for which he had stipulated, and if necessary he must join in a conveyance of the estate if the first person was a purchaser, or he must join in executing a charge if it was a charge that was to be executed, or a lease if it was a lease to be granted.

I understand the authorities further to establish this, that that principle is not affected by these Acts of Parliament which require registration in order to give or to prevent a priority, but that the conscience of the second purchaser, as I have called him, is equally affected, and that the intention of the Legislature in such acts as those I have referred to was to afford a protection to persons whose consciences were not affected, and not to give the second purchaser whose conscience was affected an opportunity of joining in the commission of that which was a breach of contract and a wrong to the first person who made the bargain.

TOLLER *v.* CARTERET.

IN CHANCERY, BEFORE LORD KEEPER COWPER, 1705.

[2 *Vernon* 493.]

Sir *Philip Carteret*, owner of the island of *Sarke*, made a mortgage thereof to one *Willowe* the plaintiff's intestate, for *five hundred* years for 500l.

The bill was that the defendant might redeem, or be foreclosed.

has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures: and it is infinitely better for the public that a trust, security, or agreement, which is wholly secret, should miscarry, than that men should lose their estates by the mere fancy and imagination of a Chancellor. The rule of *nullus recedat a cancellaria sine remedio*, was never meant of English proceedings, but only of original writs, when the case would bear one; and so the Chancellor in 5 Hen. 7 understood it: for otherwise, says he, no man need to be confessed."—*Per Lord Nottingham* in *Cook* v. *Fountain* (1676) 3 *Swanst.* 585, 600.

The defendant pleaded to the jurisdiction of the Court, that the island of *Sarke* was part of the *Dutchy* of *Normandy,* and had laws of their own, and were under the jurisdiction of the Courts of *Guernsey,* and not within the jurisdiction of the Court of Chancery; and cited 4 *Inst.* 284. *Anderson's* 2 *Rep.* 115. *Kelloway* 202.

Lord Keeper over-ruled the plea, because the grant was of the whole island: and *secondly,* that the Court of Chancery had also a jurisdiction, the defendant being served with the process here, & *aquitas agit in personam,* which is another answer to the objection.[1]

PENN *v.* LORD BALTIMORE.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1750.

[1*Vesey Senior,* 444.]

The bill was founded on articles, entered into between the plaintiffs and defendant 10 May, 1732, which articles recited several matters as introductory to the stipulation between the parties, and particularly letters patent granted 20 June, 2 C. 1, by which the district, property, and government of Maryland under certain restrictions is granted to defendant's ancestor, his heirs and assigns: farther reciting charters or letters patent in 1681, by which the province of Pennsylvania is granted to Mr. William Penn and his heirs; and stating a title to the plaintiffs derived from James Duke of York, to the three lower counties by two feoffments, both bearing date 24 August, 1682. The articles recite, that several controversies had been between the parties concerning the boundaries and limits of these two provinces and three lower counties, and make a particular provision for settling them by drawing part of a circle about the town of Newcastle, and a line to ascertain the boundaries between Maryland and the three lower counties, and a provision in whatever manner that circle and line should run and be drawn; and that commissioners should do it in a certain limited time, the final time for which was on or before 25 December, 1733. There was beside a provision in the articles, that if there should be a want of a Quorum of commissioners meeting at any time, the party by default of whose commissioners, the articles could not be carried into execution, should forfeit the penalty of £5,000 to the other party: and a provision for making conveyances of the several parts from one to

[1] For other cases stating this well established rule, and not noted in the cases printed here, see *Earl of Athol* v. *Earl of Derby* (1682-83) 1 *Ch. Ca.* 220; *Earl of Derby* v. *Duke of Athol* (1748-49) 1 *Ves. Sr.* 202; *Kildare* v. *Eustace* (1686) 1 *Vern.* 405, 419, 423, 428, 437, *s. c.* 1 *Eq. Abr.* 133; *Bayley v. Edwards* (1792) 3 *Swanst.* 703, 710; *Lord Cranstown* v. *Johnston* (1796) 3 Ves. 170, 182; *Gardner* v. *Ogden* (1860) 22 *N. Y.* 327, *Hart* v. *Sansom* (1884) 110 *U. S.* 151; *Arndt* v. *Griggs* (1890) 134 *U. S.* 316; *Allen* v. *Buchanan* (1892) 97 Ala. 399; *Hayden* v. *Yale* (1893) 45 *La. Ann.* 362; *State* v. *Zachritz* (1901) 166 *Mo.* 307.

the other in these boundaries, and for enjoyment of the tenants and landholders.

The bill was for a specific performance and execution of the articles; what else was in the cause came by way of argument to support, or objection to impeach, this relief prayed.

When the cause came on before, it was ordered to stand over, that the Attorney-General should be made a party; who now left it to the court to make a decree, so as not to prejudice the right of the crown

The first objection for defendant was, that this court has not jurisdiction nor ought to take cognizance of it; for that the jurisdiction is in the King and council.[1]

LORD CHANCELLOR. I directed this cause to stand over for judgment, not so much from any doubt of what was the justice of the case, as by reason of the nature of it, the great consequence and importance, and the great labor and ability of the argument on both sides; it being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a Roman senate rather than of a single judge: and my consolation is, that if I should err in my judgment, there is a judicature equal in dignity to a Roman senate that will correct it.

It is unnecessary to state the case on all the particular circumstances of evidence; which will fall in more naturally, and very intelligibly, under the particular points arising in the cause.

The relief prayed must be admitted to be the common and ordinary equity dispensed by this court; the specific performance of agreements being one of the great heads of this court, and the most useful one, and better than damages at law, so far as relates to the thing in *specie;* and more useful in a case of this nature than in most others; because no damages in an action of covenant could be at all adequate to what is intended by the parties, and to the utility to arise from this agreement, viz., the settling and fixing these boundaries in peace, to prevent the disorder and mischief, which in remote countries, distant from the seat of government, are most likely to happen, and most mischievous. Therefore the remedy prayed by a specific performance is more necessary here than in other cases: provided it is proper in other respects; and the relief sought must prevail, unless sufficient objections are shown by defendant; who has made many and various for that purpose.

First, the point of jurisdiction ought in order to be considered: and though it comes late, I am not unwilling to consider it. To be sure a plea to the jurisdiction must be offered in the first instance, and put in *primo die;* and answering submits to the jurisdiction: much more

[1] A part of the opinion given relates chiefly to this objection.

It will be of interest to note that the line here drawn was the famous Mason and Dixon's line which was, for many years, not only the boundary between Maryland and Pennsylvania, but also the dividing line between the free and slave states.

when there is a proceeding to hearing on the merits, which would be conclusive at common law: yet a court of equity, which can exercise a more liberal discretion than common-law courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree, than where a plain want of equity appears. It is certain, that the original jurisdiction in cases of this kind relating to boundaries between provinces, the dominion, and proprietary government, is in the King and council; and it is rightly compared to the cases of the ancient Commotes and Lordships Marches in Wales; in which if a dispute is between private parties it must be tried in the Commotes or Lordships; but in those disputes, where neither had jurisdiction over the other it must be tried by the King and council; and the King is to judge, though he might be a party; this question often arising between the crown and one Lord-Proprietor of a province in America; so in the case of the Marches it must be determined in the King's court, who is never considered as partial in these cases; it being the judgment of his judges in B. R. and Chancery. So where before the King and council, the King is to judge, and is no more to be presumed partial in one case than the other. This court therefore has no original jurisdiction on the direct question of the original right of the boundaries; and this bill does not stand in need of that. It is founded on articles executed in England under seal for mutual consideration; which gives jurisdiction to the King's courts both in law and equity, whatever be the subject matter. An action of covenant could be brought in B. R. or C. B. if either side committed a breach: so might there be for the £5,000 penalty without going to the council. There are several cases, wherein collaterally, and by reason of the contract of the parties, matter out of the jurisdiction of the court originally will be brought within it. Suppose an order by the King and council in a cause, wherein the King and council had original jurisdiction; and the parties enter into an agreement under hand and seal for performance thereof: A bill must be in this court for a specific performance; and perhaps it will appear, this is almost literally that case. The reason is, because none but a court of equity can decree that. The King in council is the proper judge of the original right; and if the agreement was fairly entered into and signed, the King in council might look on that, and allow it as evidence of the original right: but if that agreement is disputed, it is impossible for the King in council to decree it as an agreement. That court cannot decree *in personam* in England unless in certain criminal matters; being restrained therefrom by Stat. 16 Car., and therefore the Lords of the council have remitted this matter very properly to be determined in another place on the foot of the contract. The conscience of the party was bound by this agreement; and being within the jurisdiction of this court, 4 Inst. 213,[1] which acts *in personam*,

[1] "If the defendant dwell out of the county palatine, if any of the county palatine have cause to complain against them for matter of equity for lands

the court may properly decree it as an agreement, if a foundation for it. To go a step farther; as this court collaterally and in consequence of the agreement judges concerning matters not originally in its jurisdiction, it would decree a performance of articles of agreement to perform a sentence in the Ecclesiastical court just as a court of law would maintain an action for damages in breach of covenant.[1]

The next head of objection is taken from the general nature and circumstances of the agreement.

First it is true, the court never decrees specifically without a consideration: but this is not without consideration; for though nothing valuable is given on the face of the articles as a consideration, the settling boundaries, and peace and quiet, is a mutual consideration on each side; and in all cases make a consideration to support a suit in this court for performance of the agreement for settling the boundaries.

The objection of the time for performance being lapsed may be answered; for it is the business of this court to relieve against lapse of time in performance of an agreement; and especially where the non-performance has not arisen by default of the party seeking to have a specific performance; as it plainly does not here.

Next, these articles are not like submission to arbitration. In those cases generally the time is conditional, so as determination be made by such a day; here the line and circle are agreed on by distinct, independent, covenants, and that they shall form the boundaries of these tracts of land; this therefore is a particular, certain, specific contract of the parties, that these shall be the boundaries; nothing left to the judgment of the commissioners, who are merely ministerial to run the line, *&c.* according to the agreement, and set the marks. Therefore it is not like an award, but is an agreement, which this court will see pursued.

As to any imposition or surprise, the evidence is clearly contrary thereto. It would be unnecessary to enter into the particulars of that evi-

or goods within the county palatine, the plaintiff my complain in the chancery of England, because he hath no means to bring them to answer, and the court of equity can bind but the person, for otherwise the subject should have just cause of suit, and should not have remedy; and when particular courts fail of justice, the general courts shall give remedy, *ne curiae regis deficerent in justitia exhibenda.*" 4 *Inst.* 213.

[1] "Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him.

"Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*. 2 Story, Eq., sect. 899; Miller *v.* Sherry, 2 Wall. 249; Penn *v.* Lord Baltimore, 1 Ves. 444; Mitchell *v.* Bunch, 2 Paige (N. Y.), 606." *Per Mr. Justice Swain*, *Phelps* v. *McDonald* (1878), 99 U. S. 298, 308.

dence; but it appears, the agreement was originally proposed by defendant himself: he himself produced the map or plan afterwards annexed to the articles: he himself reduced the heads of it into writing, and was very well assisted in making it: and farther that there was a great length of time taken for consideration and reducing it to form. But there is something greatly supporting this evidence, *viz.* the defect of evidence on the part of the defendant, which amounts to stronger negative evidence, than if it was by witnesses; for it was in his own power to have shewn it if otherwise. Then am I to presume, he was imposed on, in a plan too sent to himself by his own agents: as to the plan itself, it was in his own power; with regard to the original of these minutes of the agreement wrote by himself, though ordered by the court to be produced, they are not produced; which negative evidence supports the evidence of the fairness of carrying on this agreement on the part of the plaintiffs.

As to the court's not enforcing the execution of their judgment, if they could not at all, I agree, it would be in vain to make a decree; and that the court cannot enforce their own decree *in rem,* in the present case: but that is not an objection against making a decree in the cause; for the strict primary decree in this court as a court of equity is *in personam,* long before it was settled, whether this court could issue to put into possession in a suit of lands in *England;* which was first begun and settled in the time of *James* I. but ever since done by injunction or writ of *assistance* to the sheriff: but the court cannot to this day as to lands in *Ireland* or the plantations. In Lord *King's* time the case of *Richardson* v. *Hamilton, Attorney-General* of *Pennsylvania,* which was a suit of land and a house in the town of *Philadelphia,* the court made a decree, though it could not be inforced *in rem.* In the case of Lord *Anglesey* of land lying in *Ireland,* I decreed for distinguishing and settling the parts of the estate, though impossible to inforce that decree *in rem,* but the party being in *England,* I could enforce it by process of contempt in *personam* and sequestration, which is the proper jurisdiction of the court. And indeed in the present case, if the parties want more to be done, they must resort to another jurisdiction; and it looks by the order in 1735, as if that was in view; liberty being thereby given to resort to that board.

I am of opinion therefore to decree a specific performance of this agreement without prejudice to any right, &c. of the crown.[1]

[1] "Whilst Courts of Equity have never claimed to act directly upon land situated abroad, they have purported to act upon the conscience of persons living here. In Lord *Crawstown* v. *Johnston* (1 *Cowp.* 161, 180), Sir R. P. Arden, Master of the Rolls, said: '*Archer* v. *Preston, Lord Arglass* v. *Muschamp, Lord Kildare* v. *Eustace,* 1 *Eq. Abr.* 133. 1 *Vern.* 75, 135, 419. Those cases clearly show, that with regard to any contract made or equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England'." *Per Herschell, L. C.* in *British So. Africa Co.* v. *Companhia de Coçambique* (1893), *App. Cas.* 602, 626.

McCORMICK *v.* GROGAN (1869) *L. R.* 4 *H. L.* 82, 97.—LORD WESTBURY: My Lords, the jurisdiction which is invoked here by the Appellant is founded altogether on personal fraud. It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now, being a jurisdiction founded on personal fraud, it is incumbent on the Court to see that a fraud, a *malus animus,* is proved by the clearest and most indisputable evidence. It is impossible to supply presumption in the place of proof, nor are you warranted in deriving those conclusions in the absence of direct proof, for the purpose of affixing the criminal character of fraud, which you might by possibility derive in a case of simple contract. The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the *Statute of Frauds,* and in this manner, also, it deals with the *Statute of Wills.*

GREAT FALLS MANUFACTURING CO. *v.* WORSTER.

IN THE SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE, 1851.

[23 *New Hampshire* 462.]

The orators owned a dam extending across Salmon river, into the state of Maine. The defendant was a citizen of New Hampshire. The orators filed a bill to restrain the defendant from going into Maine and committing acts injurious to the property of the orators situated there. The defendant raised the question of the court's jurisdiction.[1]

In an earlier case, *Foster* v. *Vassall* (1747) 3 Atk. 587, 589, the same learned Chancellor said:

"The different courts of equity are held under the same crown, though in different dominions, and therefore, considering this as a court abroad, the point of jurisdiction is the same as in *Ireland;* and it is certain where the provision is in *England,* let the cause of suit arise in *Ireland,* or the plantations if the bill be brought in *England,* or the defendant is here, the courts do *agere in personam,* and may by compulsion on the person, and process of the court, compel him to do justice."

[1] A short statement of facts is substituted for that of the original report.

GILCHRIST, C. J. The application now before us is made by virtue of the provision contained in § 7, ch. 171, Rev. Stat., which authorizes the court to "grant writs of injunction whenever the same shall be necessary to prevent injustice." Questions analogous to that now presented have often been investigated, both in England and in this country, and the principles recognized by the decisions, go far enough to authorize the court to grant the relief now prayed for. The court are not asked to assume any jurisdiction, or exercise any control over the land in Maine, or to interfere with the laws of that State. Nothing more is asked than that the respondent, a citizen of New-Hampshire, and residing within her limits, shall be object to her laws, and that, being within reach of the process of this court, he shall be forbidden to go elsewhere and commit an injury to the property of other citizens, situated here, and entitled to the protection of our laws.

In the case of *Penn* v. *Lord Baltimore,* 1 Ves., 444, Lord *Hardwicke* recognized and acted upon the principle, that equity, as it acts primarily *in personam,* and not merely *in rem,* may make a decree, where the person against whom relief is sought, is within the jurisdiction upon the ground of a contract, or any equity subsisting between the parties respecting property situated out of the jurisdiction. A decree was made for the specific performance of a contract relating to the boundary between the colonies of Pennsylvania, and Maryland. In the course of his judgment, Lord *Hardwicke* says: "this court, therefore, has no original jurisdiction on the direct question of the original right of the boundaries, and their bill does not stand in need of that. It is founded on articles executed in England, under seal, for mutual considerations, which gives jurisdiction to the king's courts, both in law and in equity, whatever be the subject matter." He subsequently says: "the conscience of the party was bound by this agreement, and being within the jurisdiction of this court, which acts *in personam,* the court may properly decree it as an agreement."

This case decides, that although the subject matter of a contract be land out of the jurisdiction, the boundary of the land may be settled by a decree for a specific performance of the contract. In this way a party within the jurisdiction may be compelled to do an act of justice, in relation to land out of the jurisdiction. The case is a leading one, and its principle has been extensively followed. This doctrine, however, was not first suggested by Lord *Hardwicke.* Before his time, it was well established in the court of chancery, although it had not received so elaborate an exposition in any preceding case, as in the decision referred to. In the case of *Arglasse* v. *Muschamp,* 1 Vernon, 75, the bill prayed for relief against an annuity charged upon the orator's lands in Ireland, on the ground of fraud. The respondent pleaded to the jurisdiction of the court, that, the lands lying in Ireland, the matter was properly examinable there, and that the court ought not to interpose. The Lord Chancellor said: "this is surely a jest put upon the jurisdic-

tion of this court, by the common lawyers; for when you go about to bind the lands, and grant a sequestration, to execute a decree, then they readily tell you, that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must, *agere in personam,* only; and when, as in this case, you prosecute the person for a fraud, they tell you, you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which make the jurisdiction local; and so would wholly elude the jurisdiction of this court." The plea was overruled. In the case of *Toller* v. *Carteret,* 2 Vernon, 494, the bill was to foreclose a mortgage upon the island of Sarke, and the respondent pleaded to the jurisdiction of the court, that the island of Sarke was part of the Duchy of Normandy, and had laws of its own, and was under the jurisdiction of the courts of Guernsey, and not within the jurisdiction of the court of chancery. But it was held, "that the court of chancery had also a jurisdiction, the defendant being served with the process here, *et æquitas agit in personam,* which is another answer to the objection." In *Lord Cranstown* v. *Johnson,* 3 Ves., 170, the master of the rolls, after commenting on some of the cases, says: "these cases clearly show, that with regard to any contract made, or equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction, as if they were situated in England." In *Portarlington* v. *Soulby,* 3 M. & R., 104, the bill was to restrain the respondent from suing in Ireland, upon a bill of exchange given for a gambling debt. Upon a motion to dissolve the injunction Lord *Brougham* said: "in truth nothing can be more unfounded, than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made, being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or convey real property locally situate abroad; if for instance, as in *Penn* v. *Lord Baltimore,* it can decree the performance of an agreement touching the boundary of a province in North America; or as in the case of *Toller* v. *Carteret,* can foreclose a mortgage, in the isle of Sarke, one of the channel islands, in precisely the like manner can it restrain the party, being within the limits of its jurisdiction, from doing anything abroad, whether the thing forbidden be a conveyance, or other act *in pais,* or the instituting, or prosecution of an action in a foreign court."

The principle that a court in chancery, will exercise such a power as the orators ask should now be enforced, whenever the case is one of equitable cognizance, and the parties are within the jurisdiction, although the property may be beyond it, is as fully recognized by the courts in this country, as in England. In *Massie* v. *Watts,* 6 Cranch, 148, the question was whether the defendant, being within the jurisdic-

tion of the circuit court, in Kentucky, could be decreed to convey lands in Ohio, and the defence was that the lands lay beyond the jurisdiction of the court. *Marshall,* C. J., said, "where the defendant is liable, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *male fides* practised upon the plaintiff, the principles of equity give a court jurisdiction, wherever the person may be found, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

It is said by Chancellor *Walworth,* in the case of *Mitchell* v. *Bunch,* 2 Paige, 606, that the original and primary jurisdiction of this court, was *in personam* merely. The writ of assistance to deliver possession, and even the sequestration to compel the performance of a decree, are comparatively of modern origin. The jurisdiction of the court was exercised for several centuries, by the simple proceeding of attachment against the bodies of the parties, to compel obedience to its orders and decrees. Although the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within its jurisdiction. By the ordinary course of proceeding, the defendant may be compelled either to bring the property in dispute, or to which the complainant claims an equitable title, within the jurisdiction of the court, or to execute such a conveyance or transfer of it, as will be sufficient to vest the legal title as well as the possession of the property, according to the *lex loci rei sitæ.*

The parties in the cause, in which these views were expressed, were foreigners, temporarily in this country. The bill stated, that the defendant had sufficient property at Carthagena or elsewhere, to satisfy a judgment which the complainant had recovered against him, and that the defendant was about to leave the State for Carthagena. The bill prayed for satisfaction of the judgment out of the property of the defendant.

Upon another application of the same principle, the chancellor held, that where the court had jurisdiction of the person, it might by the ordinary process of injunction and attachment for contempt, compel a defendant to desist from commencing a suit at law, either in that or any foreign jurisdiction. *Mead* v. *Merritt,* 2 Paige, 402. So where the person was within the jurisdiction, it was held, that the court might compel a party to execute a trust of lands in Illinois, valid by the laws of that State, or to convey the legal title according to the decree, so long as it had the power to execute its decision through the medium of the holders of the legal title. *Hawley* v. *James,* 7 Paige, 213.

In the case of *Sutphen* v. *Fowler,* 9 Paige, 280, the bill was filed for the specific performance of a contract for the sale of lands in Michigan, against the infant child of the contracting party, who at the time of

his death was entitled to a conveyance of the legal title to the premises, which was subsequently made to the defendant. It was held, that the court had jurisdiction to decree the specific performance of a contract for the sale of lands in another State, where the person of the defendant was within reach of its process, and might direct a conveyance by the infant when she should arrive at the proper age to enable her to transfer the legal title according to the laws of Michigan, and might authorize the orator to take and to retain possession of the premises until that time, if he could obtain possession of them without suit. It was also held, and that is very pertinent to the present inquiry, that in the meantime, the court might grant a perpetual injunction, restraining the defendant from disturbing the complainant in such possession, or from doing any act whereby the title should be transferred to any other person, or in any way impaired or incumbered.

This decision is in point, not only as regards the principle, but also in relation to its application to a state of facts similar to those in the case now before us. Nothing more is asked by the orators here, than that the defendant should be restrained from injuring or interfering with the property of the orators situated in Maine, and the above case of *Sulphin* v. *Fowler* is an express adjudication that he may be so enjoined. The principle is also recognized and stated, by the most eminent elementary writers. Jeremy's Eq. Jur., 557; Story's Eq. Jur. § § 743, 744, 899, 900.

It would be a great defect in the administration of the law, if the mere fact, that the property was out of the State could deprive the court of the power to act. As much injustice may be perpetrated in a given case, against the citizens of this State, by going out of the jurisdiction and committing a wrong, as by staying here and doing it. The injustice does not lose its quality by being committed elsewhere than in New-Hampshire, and as the legislature has conferred upon the court the power to issue injunctions whenever it is necessary to prevent injustice, it is the duty of the court to exercise that power upon the presentation of a proper case, and when it can be done consistently with the acknowledged practice in courts of equity. As the principle which is sought to be applied here, has been recognized for nearly two hundred years, we have no hesitation in holding, that the court has jurisdiction to issue the injunction prayed for.[1]

[1] On a bill to foreclose a mortgage upon lands situated partly in New York and partly in Pennsylvania, the Court decreed the sale of the mortgaged property and ordered a deed to be given to the purchaser of the lands situated without the jurisdiction—The Court said: "The plaintiffs sought by foreclosure and sale to enforce a mortgage executed by the defendant corporation. The Supreme Court had jurisdiction over the course of action and the parties, and its decree is valid although part of the premises covered by it are in another State. Its writ may not be operative there, nor its judgment capable of execution as against that portion of the property, and for that reason the

DILLON *v.* HELLER.

IN THE SUPREME COURT OF KANSAS, 1888.

[39 *Kansas* 599.]

Action brought by *Martin Heller* against *John H. Dillon,* to quiet the title to lot number 10, block no 33, in the city of Anthony, in Harper county. Personal service of summons could not be obtained upon the defendant in Kansas; hence the plaintiff filed an affidavit for service of summons by publication. The notice was duly published for the specified time.

The defendant made a special appearance, and moved the court to quash the service by publication, for the following reasons, to wit:

"*First.* that the same does not run in the name of the state of Kansas; *second,* that the court cannot acquire jurisdiction of the person in these cases to quiet title by such service, to wit, service by publication."

On January 23, 1887, this motion was overruled, and the defendant making no further appearance in the case, the court rendered judgment as upon a default in favor of the plaintiff and against the defendant, quieting the plaintiff's title to the above-mentioned real estate, and for costs. The defendant brings the case to this court for review.[1]

VALENTINE, J.: The plaintiff in error, who was defendant below, claims that the court below erred in the following particulars and for the following reasons, to wit:

"1. That the service of summons by publication in actions to 'quiet title' is not sufficient to give the court jurisdiction of the party defendant.

"2. That the court, not having jurisdiction of the party defendant, cannot pronounce judgment in the matter. * * *"

While the plaintiff in error does not in terms claim that a court cannot in any case where the defendant is a non-resident and out of the state, obtain jurisdiction to hear and determine the case by virtue of a service of summons only by publication, yet such is the result of his argument; and in support of such argument he cites a number of authorities, the principal of which is the case of *Hart v. Sansom,* 110 U. S. 151. We do not think, however, that the authorities cited go to the extent claimed for them. Of course a court cannot obtain jurisdiction of the person of a non-resident defendant by means only of a service of summons by publication, nor can a court obtain jurisdiction of the person of any person who is a non-resident and out of the state, by

court might have required the mortgagor to execute a conveyance to the purchaser in order that the whole security offered by the mortgage should so far as possible be made effective. *Muller* v. *Dows,* 94 *U. S.* 444, 450. This

[1] The statement of facts has been abridged.

any kind of service, or by any kind of process or notice; for the jurisdiction of the courts of any sovereignty can never extend beyond the domain of the sovereignty which creates them. (*Amsbaugh v. Exchange Bank,* 33 Kas. 100, 105.) No court in Kansas can compel a non-resident defendant out of the state to come within its territorial boundaries, or to submit himself to its jurisdiction, or to do or perform any other act or thing; but this lack of power on the part of the court does not depend upon the character of the service of process made upon the defendant, but it arises from the well-established doctrine that the jurisdiction of one sovereignty (through its courts or otherwise) cannot extend into the territorial boundaries of another sovereignty. Therefore, for the purposes of this case, it will be admitted that the court below did not have jurisdiction of the person of the defendant below, plaintiff in error. But that does not settle this controversy. The court below had jurisdiction of something. It had jurisdiction of the plaintiff below, and it had jurisdiction of the subject-matter of the action. This latter proposition, however, is questioned. Jurisdiction is of two kinds: jurisdiction of the person, and jurisdiction of the property or thing in controversy; or, in other words, jurisdiction *in personam,* and jurisdiction *in rem;* and jurisdiction in either case is sufficient to authorize a valid judgment to be rendered. Now it may be admitted, for the purposes of this case, and is admitted, that the old equitable action to quiet title to real estate was purely an action *in personam;* and indeed it will be admitted that originally every action in equity was purely an action *in personam,* but such is not the case under the statutes of this state, and such is not the case with respect to the present action. The present action is purely a *statutory* action brought by the plaintiff under § 594 of the civil code, and is one of a kind of actions which can be maintained only by a person who is in the *actual possession* of the property in controversy, either by himself or tenant. Where personal service of summons can be obtained in such an action, the action is one *in personam* as well as *in rem;* but where service of summons can be had only by publication, then the action is one only *in rem.* The present action is one only *in rem;* and the court below had ample jurisdiction to hear and determine the same. For the present, we shall assume that the statutes authorizing service of summons by publication were strictly complied with in the present case, and then the only question to be considered is whether the statutes themselves are valid; or, in other words, we think the question is this: Has the state any power through the legislature and the courts, or by any other means or instrumentalities, to dispose of or control property in the

was not done, but the power of the court was not exhausted, and what it might have ordered in the first instance, it could still require by amendment. The order appealed from goes no further than to carry out the intention of the parties to the mortgage, as ascertained by the decree—it relates to a matter within the jurisdiction of the court, and its exercise is not the subject of review. *The Union Trust Co.* v. *Olmsted* (1886) 102 N. Y. 729.

state belonging to non-resident owners out of the state, where such non-resident owners will not voluntarily surrender jurisdiction of their persons to the state, or to the courts of the state, and where the most urgent public policy and justice require that the state and its courts should assume jurisdiction over such property. Power of this kind has always been exercised, not only in Kansas, but in all the other states. Lands of non-resident owners, as well as of resident owners, are taxed and sold for the taxes; and the owners may thereby be totally deprived of such lands, although no notice is ever given to such owners except a notice by publication or some other notice of no greater value, force or efficacy. (*Beebe v. Doster,* 36 Kas. 666, 675—677.) Mortgage liens, mechanics' liens, material-men's liens, and other liens are foreclosed against non-resident defendants upon service by publication only. Lands of non-resident defendants are attached and sold to pay their debts; and indeed almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property which they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication. (*Gillespie v. Thomas,* 23 Kas. 138; *Walkenhorst v. Lewis,* 24 id. 420; *Rowe v. Palmer,* 29 id. 337; *Venable v. Dutch,* 37 id. 515, 519.) All the states by proper statutes, authorize actions against non-residents, and service of summons therein by publication only, or service in some other form no better; and in the nature of things such must be done in every jurisdiction, in order that full and complete justice may be done where some of the parties are non-residents. We think a sovereign state has the power to do just such a thing. All things within the territorial boundaries of a sovereignty are within its jurisdiction; and generally, within its own boundaries, a sovereignty is supreme. Kansas is supreme except so far as its powers and authority are limited by the constitution and laws of the United States. And within the constitution and laws of the United States the courts of Kansas may have all the jurisdiction over all persons and things within the state, which the constitution and laws of Kansas may give to them, and the mode of obtaining this jurisdiction may be prescribed wholly, entirely and exclusively by the statutes of Kansas. To obtain jurisdiction of anything within the state of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service. In the present case the plaintiff resides within the state of Kansas, and he virtually surrendered jurisdiction of himself to the court below when he commenced this action. He is in the actual possession of the property in controversy, and, being in the actual possession thereof, he also in effect surrendered jurisdiction thereof to the court when he brought this action, and as much jurisdiction thereof as any court in any action could obtain by virtue of a seizure of the property by its own officers; and service of summons by publication, as authorized by law, was afterward had in this case; and this gave the court the power to hear and determine the case, and to render a judg-

ment therein, and to enforce such judgment; and this is all that is necessary to give complete and absolute jurisdiction over the thing in controversy. Jurisdiction is simply the power to hear and determine and to enforce the judgment, order or decree made or rendered on such hearing. Nothing can be lacking in the present case. The court had the power to hear and determine the case, the power to render the judgment prayed for, which was to quiet the plaintiff's title and possession; and he was in the actual possession of the property; and as the property was and is within the territorial jurisdiction of the court, there would seem to be no good reason why the judgment is not valid and why the court cannot enforce such judgment. It is said in the case of *Hart v. Sansom,* 110 U. S. 155, that "the courts of the state may perhaps feel bound to give effect to the service made as directed by its statutes;" and also: "It would doubtless be within the power of the state in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose." Now certainly no court would feel bound to give effect to a statute unless the court believed the statute to be valid and an existing law, and if the state may rightfully provide by statute that any one of its courts may authorize a trustee to make or cancel a deed executed by or for a non-resident, or in which a non-resident is interested, then the state could unquestionably authorize the same court by its judgment alone, to cancel or in effect to create the deed, for the trustee appointed by the court is the mere creature of the court and can take no power nor exercise any power except such as emanates from the court itself. There can certainly be no necessity for the circuitous, indirect and cumbrous mode of appointing a trustee to do a thing, when the judgment of the court may itself answer the entire purpose. (See Civil Code, § 400.) If jurisdiction cannot be given to the court to render such a judgment, then, *a fortiori,* jurisdiction could not be given to the court to appoint a trustee for such a purpose. A court without jurisdiction cannot do anything—not even to appoint a trustee. We think the court below had ample jurisdiction in the present case. We think a court may in any case, where the statutes authorize the same, obtain jurisdiction upon service by publication concerning anything present and existing within the boundaries of the state. To hold otherwise would unsettle and overturn a great many titles to land in this state—titles which have long been acquiesced in and supposed to be good and valid, and to be settled and established by the statutes and by numerous judicial decisions. And to hold otherwise would also do great injustice to innocent purchasers of lands who hold the same under such titles. We think such titles are good.

CAMPYN PYNELL'S CASE.

In Chancery, 1396-1399.

[*Select Cases in Chancery,* 10 *Selden Society No.* 18.][1]

To the most honoured Lord and most reverend Father in God, the Bishop of Exeter, Chancellor of England.[2]

Beseecheth humbly Campyn Pynell, Merchant of Lucca in Lombardy, who is staying in this country under the protection of our most dread Lord the King, that whereas one Richard Underwood, tailor of London, by malice and evil design hath feigned divers suits against him, to wit, a writ of trespass in taking away his wife and his goods, returnable in the King's Bench at Nottingham on the quindene of S. Hillary in the 19th year of our Lord the King who now is [1396], for which writ the said suppliant was taken by the Sheriffs of London and put to fine and ransom to be mainprised to keep his day at Nottingham on the said quindene of S. Hillary; on which day the said Richard was nonsuited; and afterwards the said Richard sued another writ of trespass touching the same matter against the said suppliant, returnable in the King's Bench at Lincoln on the quindene of Easter in the 19th year of our said Lord the King [1396], for which the said suppliant was taken and imprisoned by the Sheriffs of London at that time, and put to fine and ransom to be mainprised to keep his day in the said King's Bench; on which day the said suppliant [appeared] in his proper person, and the said Richard counted against the said suppliant for his wife and his goods taken away, which surmise the said suppliant traversed, whereupon issue was joined between them, and the said suppliant [sued out] a *venire facias* directed to the Sheriffs of London [with clause of] *habeas corpora,* and process by distress against the jurors for divers days, as is clearly proved by the process thereof; and at last the said suppliant sued a *nisi prius* before Hugh Huls, one of the Justices of the King's Bench, on a certain day at S. Martin's in London; on which day the said Richard was non-suited; and afterwards the said Richard hath sued divers plaints before the Sheriffs of London for the same matter, on which plaints the said suppliant hath been arrested and imprisoned and put to fine and ransom for his deliverance; and every time when the said suppliant appeared in Court to answer, the said Richard was nonsuited: and now of late the said Richard hath feigned two plaints against the said suppliant, which are still pending, by which the said Richard purposeth by the assistance of divers of his maintainers to await the said suppliant with jurors procured and not indifferent to the said mat-

[1] Early Chancery Proceedings, Bundle 3, No. 38.

[2] Edmund de Stafford.

ter, to wit, of his wife and goods taken away, whereas the said wife was divorced from him because of a pre-contract, and the divorce was solemnly pronounced before the ordinaries of my Lord the Bishop of London: May it please you of your especial grace of this matter to ordain a remedy, so that the said suppliant be not destroyed and annihilated for ever by so being annoyed, imprisoned and put to costs without any cause; for God and in way of Charity.

RUSSELL AND WIFE *v.* ——.

IN THE KING'S BENCH, 1483.

[*Year Book*, 22 *Edward IV, folio* 37.][1]

In the King's Bench one Thomas Russell and Alice his wife brought a writ of trespass of the goods of the said Alice carried off *dum sola fuit:* and the defendant comes and pleads not guilty: and was found guilty with damages £20 by inquest at Nisi Prius: and before the day in bone an injunction was issued out of the Chancery against the plaintiffs, that they should not proceed to judgment under pain of £100: wherefore the judgment was stayed for a long time. And then Hussey, the Chief Justice [K. B.], demanded of Spilman and Finch [eden], who were with the plaintiffs, if they were willing to pray judgment according to the verdict. Finch [eden]. [Yes]: unless [it was] for doubt of the pain comprised in the injunction or for doubt of imprisonment of our client for nonobedience to the Chancellor, otherwise we are willing to pray judgment. Fairfax [J. K. B.] Notwithstanding the injunction he may pray judgment: for if the injunction was against the plaintiff himself, then his attorney might pray judgment, or *è contra.* Hussey. We have communed of this matter amongst ourselves: and see not any harm which can come to the party, if he prayed judgment against him: for—that he should have [again] the sum contained in the injunction—the law would not be willing to deny him this—I well know: [the plaintiff T. R. shall recover again the penalty he may be compelled to pay for the breach of the injunction]: then there is nothing else except imprisonment in the Fleet. And as to that, if the Chancellor commits a man to the Fleet, as long as you are there [pleaders in this Court], if you will give us cognizance [of it] we will issue a *habeas corpus* returnable before us, we will dismiss him: and so he shall not [be put] to great mischief; and all that we can do for him, we will do: But notwithstanding this, Fairfax said he would go to the Chancellor [Thomas of Rother-

[1] The case is printed as translated by Mr. C. P. Cooper in 1 *C. P. Cooper's Reports* 561.

cham], and ask of him that he would dismiss the injunction: and thus [the plaintiff] demanded judgment: and they had [judgment] that they should recover their damages taxed by the inquest: but they [the judges] would not give judgment [that the plaintiffs] should have damages for the vexation in the Chancery by that injunction: and they [the judges] said, that if the Chancellor would not dismiss him [the plaintiff T. R.] from the injunction, that, notwithstanding that, they would have given judgment, if the party wished to pray for it: *quod nota*, &c.

COTES *v.* PRESTON.

IN CHANCERY, 1558-59.

[*Choyce Cases in Chancery* 109.]

A writ is awarded against the Defendant, his Councellors and Attorneys, that they upon penalty of 100l. shall sue no execution of a Judgment in an action of debt commenced by the Defendant against the Plaintiff at the Common Law, until further order be taken therein by this Court of *Chancery*.

CROWDER *v.* ROBINSON.

IN CHANCERY, 1577-78.

[*Choyce Cases in Chancery* 115.]

An injunction was awarded against the defendant for stay of an Action of the Case upon an Assumpsit by him brought in her Majesties Bench against the plaintiff for or concerning an agreement or contract for a Lease for the which before the plaintiff had exhibited his bill.[1]

[1] Chancery freely granted injunctions as to actions in all other courts. *Tothill* 113, 114, notes the following: *Anonymous* (1587), stay of proceedings in a spiritual court; *Aylett* v. *Aylett* (1590), stay of proceedings in the Arches of Admiralty; *Smith* v. *Snotsbull* (1590-91), stay of proceedings in Court of Wards; *Fisher* v. *Payne* (1630-31), *Parker* v. *Bowers*, *Uvedale* v. *Harvy*, *Beamont* v. *Harry* (circa 1631-33), *Tanfield* v. *Davenport* (1638-39) stay of proceedings in the Ecclesiastical Court; *Catwallell* v. *Wynn* (1593), stay of judgment and execution in the Exchequer; *Treswell* v. *Guibon* (1633-34), stay of proceedings in the Exchequer.

Restraints have also been issued against suing in the courts of Ireland, *Lord Portarlington* v. *Soulby* (1834) 3 *Myl.* & *K.* 104, Scotland, *Kennedy* v. *Earl of Cassillis* (1818) 2 Swanst. 313, and in a foreign court. *Bunbury* v. *Bunbury* (1839) 3 Jurist 644.

ALLEN *v.* DINGLEY.

IN CHANCERY, 1577.

[*Choyce Cases in Chancery* 113.]

Forasmuch as Mr. Dr. Yale, one of the Masters of this Court, to whom the consideration of a contempt in the breach of an Injunction was committed by Master Serjeant Powtrel was referred, hath made report that the said Serjeant Powtrel after the open publishing of the same Injunction, and after perfect knowledge thereof did move at the *Kings Bench*-Barre for Judgment for the Defendant iterating his motion for the same, which he did after the sight of the said Injunction. Therefore the said Mr. Serjeant Powtrel being this present day called into this Court is openly enjoyned in the sum of one hundred pounds, not to depart out of the Town until he shall be licensed thereunto by the Right Honourable the Lord Keeper of the Great Seal of *England*.

HARTOP *v.* HARTOP.

IN CHANCERY, 1595.

[*Choyce Cases in Chancery* 37.]

An Exchequer Injunction disallowed, and the party that procured it sent for by a Pursevant, and committed.

CARLETON *v.* BRIDGMAN.

IN CHANCERY, 1595.

[*Tothill* 153.]

Because Master Bridgman served a clerk in Master Shugborough's office, a commandment from * * * to stay here, he was committed to the prison of the *Fleet*, at the suit of Carleton * * * with the opinion of the Court that no court can hinder the point of equity of this Court.[1]

[1] "*Morgan* v. *Richardson* and al., the plaintiff having a writ of privilege, was taken in execution, ordered to go abroad by *habeas corpus*, and the party

HEATH *v.* RYDLEY.

IN THE KING'S BENCH, 1613.

[*Croke's James* 335.]

In an action of debt at the common law, judgment being against the defendant, and day given to move in arrest thereof, he in the interim preferred his bill in chancery, and obtained an injunction to stay judgment and execution: but, notwithstanding, the Court granted both; for by the statutes of 27. *Edw.* 3. c. 1. and 4. *Hen.* 4. c. 23. after judgment given (be it in plea real or personal), the party ought to be quiet, and to submit thereto; for a judgment being once given *in curiâ domini regis*, ought not to be reversed nor avoided but by error or attaint. And in the same Term, upon a prohibition to stay proceedings in the court of requests, it was delivered for a general maxim in law, That if any court of equity should intermeddle with any matters properly triable at the common law, or which concern freehold, they are to be prohibited; for neither *writ of error* nor *attaint* can be brought to reverse the decrees made in those courts: otherwise it is upon trials at the common law; for all matters are there decided either by a jury of twelve men, against whom (if they err in their verdict) an attaint lieth; or by the Judges, where if they err in their judgment, the party grieved may bring his writ of error.[1]

that arrested him to be committed, about *Hil.* 17 *or* 18 *Jac.* (1620-21)." *Tothill* 154. And see generally the cases under "Privilege in Chancery." *Tothill* 152 *et seq.*

"*Inter Graham* and *Stone*, *M* 9 *Jac. Stone*, pleaded privilege of the Exchequer the Chancellour said, no Exchequer man is privileged against the Chancery, nor the Lord *Bacon* himself, except the matter concern the King, and said, that if the defendant did endeavor to get an Injunction (as was informed) to stop this Court, he would commit him, and said he would know those lawyers that occupy their wits to justle Jurisdictions of Courts together." *Choyce Ca.* in *Ch.* 37.

"The subpoena, as a writer of the time of James I. says speaking of injunctions to stay proceedings at law, is directed to the party, not to the justices, to surcease, Treatise of Subpoena, *Hargr. L. Tr.* 333. There are, however, some instances of irregularities in this respect. In a case where the judges had warned a plaintiff not to proceed in an action in defiance of an injunction, Lord C. Bromley ordered the Clerk of Assize not to return the postea, Reg. L. A. 1582, fo. 19."—1 *Spence Jurisdiction of Court of Chancery* 426, *n.* (*b*).

[1] "The most frequent exercise of the jurisdiction of the Court in granting injunctions, was to restrain proceedings at law. It must have been very soon found that without such an interference, it would be impossible for the court to carry out the jurisdiction it had assumed, of controlling the law on

B.—There is no Right Without a Remedy.[1]

GRAVENOR *v.* RAKE.

In Chancery, 1588.

[*Tothill* 3.]

The court compels the lord to admit a tenant copyholder to sue at law, without any forfeiture of his copyhold.

the principles of equity and conscience. Accordingly, from the time of Henry VI. downwards we find numerous instances of the granting of such injunctions. These injunctions were enforced not only against the parties and their solicitors, but their counsel also, as we learn from the cases of Serjeants Glanvil and Powtrel, and of "Master Robert Snagg." The Chancellors having, as before noticed, perservered in granting injunctions to restrain proceedings at law even *after judgment;* their right was vehemently opposed in the time of Edw. IV. In one case, 21 Edw. IV., Fairfax held that the Court of King's Bench had the power of granting injunctions to restrain parties from resorting to any means of delaying actions, even before judgment, in cases within the jurisdiction of the Courts of Common Law; but the Court of Chancery, as we learn from subsequent authorities, still continued to restrain proceedings at law by action on the case, where a bill was filed in that court for specific performnce. In the 22 Edw. IV., Hussey, C. J., of the King's Bench, and Fairfax, J., in the case then before them, declared, that as for the penalty that could not be recovered, and if the Chancellor should commit any of the parties, the judges would release them on their being brought up before them by *habeas corpus:* Fairfax, however, said he would *go to the Chancellor*, and endeavor to persuade him to withdraw the injunction; but the Chancellor appears to have been inflexible, and the exercise of the jurisdiction was continued.

"The jealousy of the common law judges against this jurisdiction displayed itself again in the reign of Henry VIII.; indeed Wolsey, when Chancellor, appears to have been rather unscrupulous in granting injunctions. Sir Thomas More endeavored, by a conference with the judges, to allay this jealousy; however it broke forth again in the reign of Elizabeth, and a barrister was indicted in the Court of King's Bench under the statute of *præmunire*, for exhibiting a bill in Chancery for an injunction after judgment at law in that court.

"In the reign of James I. there was an open rupture between Lord Ellesmere and Lord Coke, as to the right of the Court of Chancery to grant injunctions

[1] "To this maxim may be generally referred all the enabling doctrines of equity, and especially those not referable to any other particular maxim. Its earliest and boldest application was in the foundation of the great system of *trusts*, which constitutes a large portion of equity jurisdiction."—Phelps, Juridical Equity § 193.

ROSWELL'S CASE.

IN CHANCERY, 1567.

[*Dyer* 263 b.]

A woman, tenant for a term of life of a copyhold parcel of the manor of Torels Preston, took an husband, and the reversion of the said copyhold was granted to three for the term of their lives successively, according to the custom of the manor. And afterwards the husband of the said woman made a surrender to the use of the first of the said reversions for the term of his life, and so he was admitted tenant; and afterwards he died and the second in reversion likewise; and the third (living the husband, and his wife who made no surrender) prayed to be admitted to the copyhold.[1] * * * But the case was further, that the husband and wife would release all the right of the wife to the surviving revisioner: and the lord would not receive it or hold a court for it, *Quære,* Whether he shall not be bound in conscience to do it? But in the next *Michaelmas* Term it was decreed and ordered that the lord should hold his court &c. or avoid the possession.[2]

after judgment. That sovereign took upon himself to settle the matter. For that purpose he desired the attorney-general, Sir F. Bacon, and the king's counsel to certify what had been the *ancient practice* in the time of his predecessors. They accordingly certified, that in the time of Henry VII., Henry VIII., Edw. VI., and Mary and Elizabeth, there had been a great many injunctions granted after judgment in actions of different natures, real and personal, in the king's several Courts of the King's Bench, Common Pleas, and the Justices in Eyre. King James (14th July, 1616), on this certificate ordered, that thenceforth the ancient practice as so certified should be continued. In 1655, the Lords Commissioners held, that where there was an *original equity* arising out of the natures of the transaction, which was not properly cognizable at law, that the party was not estopped by the verdict from seeking relief in the Court of Chancery; and the Court has since interfered, even after execution executed." 1 *Spence, Juris. of Court of Chancery* 673 *et seq.*

For a fuller account of the rupture between Sir Edward Coke and Lord Ellesmere and the resultant and final triumph of equity see Wilson's Life of James I, 94, 95; 2 Campbell's Lives of the Chancellors, 241 *et seq;* and especially a learned note by Francis Hargrave to Crowley's Case (1818) 2 Swanston, 1, 24-28.

See Phelps' charming monograph, Falstaff and Equity (1901), on the struggle between Courts of Law and the High Court of Chancery, and the elaborate interpretation and illustration of Falstaff's "gag": "Come, my masters, let us share and then to horse before day. And the Prince and Poins be not two arrant cowards, *there's no equity stirring.* There's no more valor in that Poins than in a wild duck."

[1] A part of the case has been omitted.

[2] "Touching copyholders, Mr. *Fitzherbert* in his *Natura Brevium,* folio 12,

FORD *v.* HOSKINS.

In the King's Bench, 1615.

[*Croke's James* 368.]

Action on the case against the defendant, being lord of the manor of *Beaminster,* in the county of *Dorset.* Whereas *John Ford* was copyholder for life of the said manor (where the custom of the manor is, that a copyholder for life may nominate his successor to have it for life, and that such a person nominated should compound with the lord for his fine; and if he could not compound, then he should give such a fine as the homage of the manor should assess, and should be admitted, and hold for his life); and alledgeth in fact, that his father nominated him his successor to have for life, and died; that he tendered for his composition, and could not be accepted; whereupon the homage assessed a fine of forty shillings, which he tendered to pay, and the defendant would not accept thereof, nor admit him, whereby he lost the benefit thereof, nor could sell it; and thereupon he brought the action. The defendant pleaded not guilty; and it was found against him.

It was now moved in arrest of judgment, that this action lies not; for although it hath been alledged that this custom pretended is good, yet forasmuch as he who is so nominated hath not *jus ad rem nec jus in re* until admittance, and a copyholder, in the eye of the law, is but tenant at the lord's will, if the lord will not hold court, he hath no remedy to compel him to admit him, but by order of chancery, as 4. *Co.* 28. b. *Westwick's Case.* 32. *Hen.* 6. *pl.* 3. *Lit. fal.* 3.

The Court held, that the action lay not, for he hath not any interest therein: and it would be infinite if every copyholder, upon pretence of refusal, should have an action, for then the lord at his peril ought to admit; which would be mischievous: and there never was any action brought before these times against a lord of a manor for non-admittance;

noteth well, that forasmuch as he cannot have any writ of false judgment, nor other remedy at common law against his lord, therefore he shall have aid in *Chancery;* and therefore if the lord will put out his copyholder that payeth his customs and services, or will not admit him to whose use a surrender is made, or will not hold his court for the benefit of his copyholder, or will exact fines arbitrary, where they be customary and certain, the copyholder shall have a *subpœna* to restrain or compel him as the case shall require. *Dyer,* 264, and 224. *Fitz. Subpœna,* 21."—Cary 4.

Francis states the maxim "Equity suffers not a Right to be without a Remedy," with the following note: "*Note* the Rights here intended, are those which the Law acknowledges to be such; and never gives judgment against them, tho' it cannot give a Remedy for them; and not equitable Rights, for which Equity gives a Remedy in the very creation of them." *Maxims of Equity* 24.

but always the remedy against the lord was only in chancery: wherefore there is not any reason to give allowance to such framed actions, newly devised. It was therefore adjudged for the defendant. *Vide* 14 *Hen.* 8. *pl.* 246. *N. B.* 47. *h.* that action on the case lies against an archdeacon for not inducting.

NEWLY *v.* CHAMBERLAINE.

IN CHANCERY, 1629-30.

[*Tothill* 3.]

The Court compels a lord to admit a tenant.[1]

MAYOR OF LONDON ET AL. *v.* SLAUGHTER.

IN CHANCERY, BEFORE LORD KEEPER BRIDGEMAN, 1671.

[1 *Cases in Chancery* 203.]

The bill was to bring in one that lived out of the jurisdiction of London, to come and give security to the city for the orphan's portion, according to the custom of the city.

The defendant in his answer offers to do as this court should direct, but being no freeman, would not be subject to the city orders.

THE RECORDER. This court useth to assist the city in such like cases, and on petition useth to grant subpœna's to persons to appear before the mayor in his court, and cited a precedent 28th February, 3 Jac. Fish and Cole's case, of a subpœna out of the subpœna office.

Maynard for the defendant. This custom concerns the country as well as the city, and must be tried by verdict; and it is inconvenient for country gentlemen to be put to give security to the orphans' court by recognizance.

The Lord Keeper decreed the plaintiffs to try the custom.[2]

[1] Tothill 2, 3, also notes two other cases to the same effect: Lunsford v. Popham and March v. Gage.

[2] "But though the Chancery will assist the jurisdiction of inferior Courts in the doing of what is Just and Right; yet if there will likely be a Failure of Justice, Equity will prohibit their proceedings and restrain their Jurisdiction as in 1 *Roll. Abr.* 374. *Pl.* 4. 12 *Co.* 113. *Max. Eq.* 25, 26." Reporter's Note, fol. ed. 1735.

And see *Edward's Case* (1610) *Lane* 98.

CHAMPERNOON *v.* GUBBS.

IN CHANCERY, BEFORE LORD KEEPER WRIGHT, 1700.

[2 *Vernon* 382.] [1]

The plaintiff on her marriage had a rent-charge of *one hundred and twenty pounds per ann.* settled on her in lieu of a jointure, with power of distress; and there being no less than *five hundred pounds* arrear, and no sufficient distress to be found on the land; the bill was against the devisee of the inheritance, that a sufficient distress might be set out, or that the plaintiff might hold and enjoy the land until satisfied the arrears, and the growing payments.

The *Lord Keeper* thought not fit to relieve the plaintiff, declaring the law never gives any other remedy, than what the party has provided for himself, and the remedy here being only by distress, and not to enter upon and hold the lands, declared he could not relieve the plaintiff, unless some particular fraud had been proved; as letting the land lie fresh, or depasturing it in the night time, on purpose to prevent a distress and if that were the case, such fraud by tenant for life ought to turn to the prejudice of the remainder man, to charge the land with arrears, which incurred in the time of the tenant for life, and declared he must dismiss the bill.

The defendant proposing that if the plaintiff would quit the arrears, he would pay all the growing annuity, and be decreed to pay it; her counsel took time to return an answer to the proposition.[2]

LOKER *v.* ROLLE.

IN CHANCERY, BEFORE LORD CHANCELLOR LOUGHBOROUGH, 1795.

[3 *Vesey Junior* 4.]

LORD CHANCELLOR [LOUGHBOROUGH]. Upon the face of the bill it is quite clear, the Plaintiff may draw a declaration in ejectment. The bill states the title, and that by some means or other the same persons are in possession of all the lands, and have confounded the boundaries: the

[1] S. C. Prec. in Chancery 126.

[2] See also *Earle of Warrington* v. *Langham* (1698) *Prec. in Ch.* 89; *Collins* v. *Plummer* (1708) 1 *Peere Williams* 104; *Bosvil* v. *Brander* (1718) *ib.* 458; *Bayly* v. *Corporation of Leominster* (1792) 1 *Ves.* 476; *Cooke* v. *Wiggins* (1804) 10 *Ves.* 191.

"But, regularly, the law never gives any other remedy than what the party

only consequence is, that the Plaintiff may come for a discovery to know, what are the farms, and who are in possession: but that never can entitle him to come for possession and an account. He avers, contrary to the fact disclosed by his bill, that he does not know the lands. He describes the two farms and the tenement. If he had filed a bill for discovery only, he must have paid for the discovery: but it goes on to pray relief, that is merely an ejectment. As to the form of the demurrer, I take it to be now a settled point, that though he may be entitled to a discovery, yet if he goes on to pray relief, to which he is not entitled, it is a good ground of demurrer, and the Defendant is not to be put to answer. He may bring an ejectment for a farm, the name of which he knows, and a tenement, which he describes by the name of the last occupier. Allow the demurrer.

REES *v.* CITY OF WATERTOWN.

IN THE SUPREME COURT OF THE UNITED STATES, 1873.

[19 *Wallace* 107.]

The complainant was the holder of bonds issued by the defendant city to the Watertown and Madison Railroad Company. He brought suit against the city on those in his possession and obtained judgments upon which executions were returned unsatisfied. He then procured a mandamus against the city officials directing them to levy and collect a tax upon the taxable property of the city in order to pay the judgment. Before the writ could be served, a majority of the city council resigned their offices. An alias mandamus and a pluries mandamus were met by the succeeding officials with the same devices. The legislature of the State of Wisconsin, passed certain acts which it was alleged were intended to aid and did aid the defendant in evading to pay these debts. The bill alleged that the corporate authorities were trustees for the benefit of the creditors of the city; that the property of the citizens was a trust fund for the payment of its debts; and that the court should lay hold of such property by its own officers. The bill then prayed that the marshal of the court might be directed to seize property of the citizens, sell it, and apply proceeds

has provided for himself, for this would be to alter the agreement of the parties; though in some cases, it is otherwise. And the diversities seem to be thus settled: 1st, where there is no remedy at law, equity will certainly grant one; as in case of a rent-seek, to decree seisin; or where the deeds, by which it is created, are lost, and so uncertain what kind of rent it was; for wherever there is a right, there ought in equity to be a remedy for it."—1 *Fonblanque, Equity Bk.* 1 *ch.* 3, § 3.

on his judgments. The answer set forth the impossibility of paying the debt and an offer to pay a compromised sum. Among other things, the plaintiff insisted first, that he having established a clear legal right at law, and there being no legal remedy, it was the duty of the court to devise and enforce by its own officers an effectual remedy. (The defendant contended the court might only use for enforcing its decree as to state laws, the regular city officials.) Secondly, that all legal remedies having failed of enforcement, after repeated trials, equity should grant relief.[1]

Mr. Justice HUNT delivered the opinion of the court.[2]

We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important. * * *

If the power of taxation is conceded not to be applicable, and the power of the court is invoked to collect the money as upon an execution to satisfy a contract or obligation of the city, this section is directly applicable and forbids the proceeding. The process or order asked for is in the nature of an execution; the property proposed to be sold is that of an inhabitant of the city; the purpose to which it is to be applied is the satisfaction of a debt of the city. The proposed remedy is in direct violation of a statute in existence when the debt was incurred, and made known to the creditor with the same solemnity as the statute which gave power to contract the debt. All laws in existence when the contract is made are necessarily referred to in it and form a part of the measure of the obligation of the one party, and of the right acquired by the other.

But independently of this statute, upon the general principles of law and of equity jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as is that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations. Judge Story

[1] The statement of facts has been abridged.

[2] A part only of the opinion has been printed.

says, "There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or to mitigate," of which he cites many instances. Lord Talbot says, "There are cases, indeed, in which a court of equity gives remedy where the law gives none, but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows."

Generally its jurisdiction depends upon legal obligations, and its decrees can only enforce remedies to the extent and in the mode by law established. With the subjects of fraud, trust, or accident, when properly before it, it can deal more completely than can a court of law. These subjects, however, may arise in courts of law, and there be well disposed of.

A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels. Thus, assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defence to the debt itself, or if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are in some cases beyond legislative interference. The proceeding supposed would violate that fundamental principle contained in chapter twenty-ninth of Magna Charta, and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law—that is, he must be served with notice of the proceeding, and have a day in court to make his defence.

We apprehend, also, that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit a question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that, by means of the aid afforded by the legislature and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they

are confounded in the present proceeding. To illustrate: the writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in Central New York combinations of settlers and tenants disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could gain possession of his land. There was a perfect remedy at law, but through fraud, violence, or crime its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by means of illegal violence, but the remedies remained as before. It was the case of a miniature revolution. The courts of law lost no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is adequate and complete, and time and the law must perfect its execution.

Entertaining the opinion that the plaintiff has been unreasonably obstructed in the pursuit of his legal remedies, we should be quite willing to give him the aid requested if the law permitted it. We cannot, however, find authority for so doing, and we acquiesce in the conclusion of the court below that the bill must be dismissed.[1]

JUDGMENT AFFIRMED.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice SWAYNE, dissenting:

I dissent from the opinion of the court in this case upon the ground that equity will never suffer a trust to be defeated by the refusal of the trustee to administer the fund, or on account of the misconduct of the trustee, and also because the effect of the decree in the court below, if affirmed by this court, will be to give judicial sanction to a fraudulent repudiation of an honest debt. For which reasons, as it seems to me, the decree of the subordinate court should be reversed.

[1] "It is true that where the law gives neither right nor remedy, however hard it may be, equity cannot assist. So in the case of damages for a personal injury, which arises *ex delicto* and not *ex contractu*, they are gone with the person, but it is not so clear in the case of a demand the recovery of which has been prevented by a difficulty unconscientiously thrown in the way by another person. There equity will give relief, and the relief it gives is beyond that which the party could obtain at law." *Per Sir Richard Pepper Arden, M. R.*, in *Curtis* v. *Curtis* (1789) 2 *Bro. Rep.* 620, 633. And see *Dormer* v. *Fortescue* (1744) 3 *Atkyns* 124.

"Where there is a remedy at law, equity will not grant a further one, although the remedy at law is not sufficient; unless there be some fraud, or the like."—*Fonblanque, Equity Bk.* 1, *ch.* 3, § 3.

POWERS'S APPEAL (1889) 125 *Pa. St.* 175, 186.—Mr. Justice WILLIAMS: —The maxim of the common law that wherever there is a right there is a remedy for its infraction, has never been adopted by courts of equity. A party whose right is clear may sleep upon it until his demand bebecomes stale. He may look on while valuable structures are erected, when he might successfully object, and remain silent until large sums have been expended or important intervening interests have grown up. In such cases the fact that he might have objected at the outset will not avail him. A suitor must not only appear in a court of equity with clean hands, but he must come with reasonable promptness, in good faith, and with a just and equitable demand; otherwise the conscience of the chancellor will not be moved. If an injunction is prayed for where, upon a consideration of the whole case, it ought not in good conscience to issue, a mere legal right in the plaintiff will not move the chancellor.[1]

C.—HE WHO SEEKS EQUITY MUST DO EQUITY.[2]

SHUTTLEWORTH *v.* LAYCOCK.

IN CHANCERY, BEFORE LORD KEEPER NORTH, 1684.

[1 *Vernon* 244.]

Where there is a debt secured by a mortgage, and also a bond debt: when the heir of a mortgagor comes to redeem, he shall not redeem without paying the bond debt too, in case the heir be bound; so if there are two mortgages and one is defective, if he will redeem he must take both.

[1] "Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident or mistake, to so modify it as to make it legal and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction, or the contract is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof." *Per Mr. Justice Jackson* in *Hedges* v. *Dixon County* (1893) 150 *U. S.* 182, 192.

"I do not understand that equity, even under the benign administration of the longest footed chancellor, undertakes to enforce moral obligations in the length and breadth of the Golden Rule, and it is important that we should keep its boundaries carefully marked."—*Per Mr. Justice Mitchell* (dissenting) in *Hoffner's Estate* (1894) 161 *Pa. St.* 331, 344.

[2] For a collection of the early cases, see *Francis, Maxims of Equity* 2.

MARGRAVE *v.* LE HOOKE.

IN CHANCERY, BEFORE THE LORD COMMISSIONERS, 1690.

[2 *Vernon* 207.]

The plaintiff's bill was to redeem a mortgage made by his father to the defendant, who by answer insisted, that the plaintiff's father had made him two several mortgages of several lands, that the plaintiff endeavoured to defeat him of one of those mortgages, by reason of an entail, and hoped that in equity he should redeem both or neither.

Per Cur. He shall redeem both or neither; and so if one mortgage had been deficient in value, and the other mortgage had been more worth than the money lent upon it, the heir should not have been admitted to redeem the one without the other.

POPE *v.* ONSLOW.

IN CHANCERY, BEFORE SIR JOHN TREVOR, M. R., 1692.[1]

[2 *Vernon* 285.]

The plaintiff as assignee of a statute of bankrupt, brought his bill to redeem a mortgage of the manor of *Newington* in *Kent,* made by the bankrupt to the defendant.

The defendant by answer insisted, that he first lent the bankrupt 200l. on a mortgage of a particular tenement, and afterwards lent him 300l. on a mortgage of the manor of *Newington,* which was of better value than the money due, but the first mortgage was deficient in value.

Per Cur. If the plaintiff will redeem one, he shall redeem both.

EX PARTE KING.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1753.

[1 *Atkyns* 300.]

It was said by Mr. Ord it was determined in the case of *Pope* v. *Onslow,* 2 *Vern.* 286, where *A.* had two mortgages upon different independent estates of the mortgagor, one a deficient security, and the other

[1] "Trevor was a lawyer of no small learning and ability, and apparently as upright on the bench as he was unscrupulous in the House of Commons (Burnet *Own Time,* fol. edit. II. 42)." Dictionary Biography, Article Trevor.

more than sufficient; that the mortgagor should not redeem the last, without making good the deficiency of the other security.

Lord Chancellor said he was not satisfied that this was the established rule of the Court, and upon looking into the case above, found it very imperfect, and therefore declared he would not have it cited for the future, till it had been compared with the entry in the Register's office, and said farther he was very apt to believe that the tenements were parcel of and held of the manor of *Sale,* and that was the reason Lord *Cowper* so determined.

WILLIE *v.* LUGG.

In Chancery, before Lord Northington 1761.[1]

[2 *Eden* 78.]

One *Samuel Willie* created by indenture to *Robert Dixon,* a term for 500 years on an estate known as *Dixon's Farm,* as security for a loan of £350. Later he settled this same estate upon trustees to the use of his wife for life, remainder according to her appointment. *Willie* owned two adjoining estates, *East Dales,* also covered by the mortgage to *Dixon,* and *West Dales.* Later *Willie* sold part of the *Dixon Farm.* He then settled upon himself and wife, with remainders, *East Dales. Dixon* assigned his rights in *Dixon Farm* to the defendant *Lugg.*[2]

The bill was brought by Mrs. *Willie* against *Lugg,* and the executors of *Dixon,* who was dead, to redeem the *East Dales.*

The Lord Chancellor.

This bill was brought to redeem the *East Dales,* and to leave *Dixon's Farm,* now reduced in point of value by the mortgagees selling a part

[1] "In Lord Eldon's judgment, Northington was 'a great lawyer and very firm in delivering his opinion' [*Watkins* v. *Lea* (1802) 6 *Ves.* 633, 640]. It has, however, been truly remarked that his boldness in delivering his opinions was not quite equalled by his care and caution in forming them. When Fox (the father of Charles James) consulted him whether the King could not revoke the patents granted in former reigns, and whether the case might not be laid before the twelve judges for their opinion, Northington is said to have replied, 'Yes, they might lay the idea before the judges and then refer Magna Charta to them afterwards to decide on that, too.' Walpole Memoirs of the Reign of George III., i, 240." (Dictionary Biography, Article, Henley.)

A further quotation from the same source will scarcely be out of place:

"In his youth he was a hard drinker, and when suffering in later life from a severe fit of gout was overheard in the House of Lords muttering to himself, 'If I had known that these legs were one day to carry a chancellor I'd have taken better care of them when I was a lad.'" (Memoirs, p. 13.)

[2] The statement of facts is abridged and the arguments of counsel omitted.

for the benefit of the plaintiff, who had the inheritance. The question is, whether she can come into this court for such an equity.

Every mortgagee, when the mortgage is forfeited, has acquired an absolute legal estate. Upon what terms can this court proceed to a redemption? By giving the mortgagee the value of his money, its fruit, and his costs, and upon those terms only: for it is obvious injustice to help to the restitution of the pledge, without a full restitution of what it is first pledged for. If a person makes two different mortgages of two different estates, the equity reserved is distinct in each, and the contracts are separate: yet if the mortgagor would redeem one, he cannot; because if you come for equity you must do equity;[1] and the general

[1] "It will be remembered that there were numberless cases which were allowed by the Prætors as sufficient, by way of exception or plea, to avoid a demand which would not have availed to give to a man an action, legal or equitable, *civilis* vel *utilis*, as plaintiff. An illustration taken from the rule as adopted by our ecclesiastical Courts, may be referred to. In suits for divorce, recrimination is allowed in many cases where the circumstances would not of themselves afford grounds for an application to the court for a divorce, at the instance of the party who urges them. This principle, transmitted from the earliest times, is acted upon in the Court of Chancery at the present day. But the early Chancellors carried the principle farther, and held, that he who applied to the court of equity, should himself *do* equity; and this is still a governing principle. Here one of the distinctive features of the proceedings in the Court of Chancery may be discerned. The nature of the pleadings and of the judgment at law, precluded the possibility of introducing cross demands in one action.

"However, in the reign of Elizabeth and her immediate successors, the principle last alluded to, was carried to an extent far beyond its present limits. Even moral duties were enforced on the part of the plaintiff as a condition precedent to his obtaining relief.

"[Mr. Phillips, as counsel for the plaintiff, having moved before Sir C. Hatton, L. C., to set aside a decree of the late Lord Keeper Bromley, asserting, as one of his grounds, that it was *without precedent* to make an order against the plaintiff; many precedents of such decrees in the reigns of Hen. VIII. and Edw. VI. having been produced, Mr. Phillips was for such his assertion committed to the Fleet. The following is an abstract of the order, which is curious in many respects: "And because the said Mr. Phillips could not excuse himself of rashness and oversight in making the aforesaid information (though he protested he never meant by the same to impeach the honorable proceedings of this court, but was deceived therein by the untrue information of the plaintiff, and craved pardon). Therefore, and because the motion tended to the open accusation of the late Lord Chancellor and this honorable court, that they had not proceeded seriously, and according to right and equity in this cause, which might not for the honor of this court escape altogether unpunished: It is ordered, that Mr. Phillips be committed to the prison of the Fleet for his rash motion only, and not for any other fault or respect." Reg. Lib. 1587, fol. 626, *Brocas* v. *Savage Knight, and the Lady Eleanor his Wife.* Mr. Phillips, as the subsequent books show, did not suffer in his business from this act of oppression.—n. (b)].

estate being liable to both mortgages, this court will not be an instrument to take illegally from a mortgagee that by which he will be defrauded of a part of his debt.

I cannot see any difference between that case and the case at present under consideration; for the principle upon which the court proceeds subsists as long as the equity of redemption remains united. If you come to redeem separately, you come for equity without doing equity; paying a debt, in lieu of which the mortgagee can hold both your estates until this court interposes.

There seems also a manifest distinction between this case and the case of a purchase subject to a mortgage; for there the purchaser acquires a right to redeem that particular mortgagee, and when he comes to redeem, he offers to equity to pay all that his estate is a debtor for.[1]

Bill dismissed without costs.

"On this principle also decrees in favor of the defendant in the plaintiff's own suit, were frequently made, at least from the time of Henry VIII., where the defendant established a case against the plaintiff, in relation to the subject-matter of the suit. Thus the lands in dispute were sometimes decreed to the defendant, or it was decreed that the defendant should hold and enjoy, and that the plaintiff should deliver to him the deeds; and sometimes the plaintiff was enjoined by the decree from further troubling the defendant as to the subject of the suit: and even when the plaintiff had made out a clear case for relief, and obtained a decree, it was sometimes suspended in order to force him to do moral equity by complying with an offer of the defendant, which the Lord Keeper considered reasonable."—1 *Spence Jurisdiction of the Court of Chancery* 422.

[1] The rule, however, laid down in the old cases, *Purefoy* v. *Purefoy*, 1 *Vern.* 26. *Shuttleworth* v. *Laywick*, *ib.* 245. *Margrave* v. *Le Hooke*, 2 *Vern.* 207. *Pope* v. *Onslow*, *ib.* 286. (the authority of which, however, was doubted by Lord *Hardwicke* in *ex parte King*, 1 *Atk.* 300.) *Ex parte Carter*, *Amb.* 733. *Roe* v. *Soley*, *Bl. Rep.* 726. that a mortgagor of two distinct estates, upon distinct transactions, to the same mortgagee, cannot redeem one without redeeming the other, seems, by modern decisions, to have been extended to a purchaser of the equity of redemption of one of the mortgaged estates, without notice of the other mortgage. *Cator* v. *Charlton*, cit. 2 *Ves.* jun. 377. *Collet* v. *Munden* cit. *ib.* *Ireson* v. *Denn*, 2 *Cox*, 425, *Et vide Jones* v. *Smith*, 2 *Ves.* jun. 372.—Reporter's note.

IRESON *v.* DENN.

IN CHANCERY, BEFORE SIR RICHARD PEPPER ARDEN, M. R., 1796.[1]

[2 *Cox, Chancery* 425.]

Bill by the purchaser of the equity of redemption against the mortgagee to redeem.

Defendant, by his answer, stated a subsequent mortgage made to him by the same mortgagor of distinct premises, and for a *distinct* debt; and insisted that the plaintiff had no right to redeem the first mortgage without redeeming the second.

And his Honour said he did not know why such a rule was ever laid down, but that it had been decided by many cases, that a mortgagee of two distinct estates upon *distinct* transactions from the same mortgagor was entitled to hold *both,* even against the purchaser of the equity of redemption of one of the mortgaged estates, without notice of the *other* mortgage, until payment of the whole money due on both mortgages. And his Honour thought the persons interested in the equity of redemption of the second mortgage were necessary parties to this suit; and directed the cause to stand over to make these parties accordingly.—*Reg. Lib. A.* 1796, *fol.* 399.

HOWARD *v.* MOFFATT.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1816.

[2 *Johnson's Chancery* 206.]

The bill stated that the father of the plaintiff's wife died intestate, leaving five children, and a large real and personal estate; that part of the real estate, by the consent of the plaintiff, and the proceeds of what

[1] While the friendship of the younger Pitt accounted for Arden's various promotions, he was a sound lawyer and judge as well as wit and man of the world. Indeed, it is said that Arden's "decisions show him to have been a better equity judge than Thurlow, much as Thurlow would have been surprised at being considered inferior to 'little Peppy,' the man he most contemned." (Dictionary Biography, Article, Arden.)

There is, however, ample justification for Arden's reputation: Chief Justice BEST pronounced him "one of the safest guides in Westminster Hall." Newton *v.* Cowie (1827) 4 Bing. 234, 242; and Lord ELLENBOROUGH spoke of him as one "who, to a very sound judgment, joined a very accurate knowledge of the law of real property." Goodtille *v.* White (1812) 15 East 174, 198.

had been sold, are in the hands of the defendant, who refused to account, &c. The bill prayed that the defendant might account, and pay over the money to the plaintiff.

The defendant, (who is the brother of the plaintiff's wife,) in his answer, admitted the death of the ancestor, and the estate, &c., and stated the personal estate had been duly distributed; that most of the real estate had been sold; that he had in his hands moneys belonging to the wife of the plaintiff, amounting to 1,290 dollars and 90 cents; and that she had frequently requested him not to pay it over to her husband.

The master's *report* stated, that there were 1,923 dollars and 77 cents due from the defendant; that it was proved before him, that the plaintiff was, by profession, a mariner, and poor; and that the defendant was a person of property, and a prudent man; that the wife of the plaintiff was examined, by consent, and stated, that she had always lived harmoniously with her husband, who was captured, some years ago, by a *French* privateer, and remained in *Europe* for five years, and was absent from *New-York* seven years: that when he went abroad he left money sufficient to maintain her during the time he expected to be absent; but the sum, and the credit he had given her, were soon exhausted, and she was obliged to sell the plaintiff's furniture for her maintenance; that before, and since the period of his absence, she had been exclusively maintained by him; and during his absence he had corresponded with her by every opportunity. That, as the plaintiff was now out of business, and might prove unfortunate, she wished the defendant to keep her money, as it would be safer with him; and that she was, at present, maintained by the plaintiff.

The cause was now brought on for a final hearing.

THE CHANCELLOR [KENT]. The general rule is, that where the aid of the Court is requisite to enable the husband to take possession of the wife's property, he must do what is equitable, by making a reasonable provision out of it for her maintenance and that of *her children,* and without that, the aid of the Court will not be afforded him. The practice is, for the husband, on a reference, to make proposals of a settlement before a master, and, on the coming in of his report, the Court judges of its sufficiency. Whether the husband applies by himself, or a suit for the wife's debt, legacy, portion, &c., be brought by the legal representatives of the husband, as his executors, or assignees, the result is the same, and the aid of the Court will not be afforded without a suitable settlement, unless, perhaps, the wife comes into Court, and on examination voluntarily waives any provision. It seems now to be understood, (Sir *Wm. Grant,* in *Murray* v. *Elibank,* 13 *Vesey,* 1.) that the wife may, at her option, waive any settlement, though in one case, Lord *Hardwicke* still sternly insisted on a provision for her, (*ex parte Highham,* 2 *Ves.* 579.) if indeed we may rely on a loose authority, and which was directly contrary to a prior and strong case in his time on that point. (*Willats* v. *Cay,* 2 *Atk.* 67.) The extent of the provision will depend upon the cir-

cumstances of each case. If the husband can lay hold of the property without the aid of a Court of equity, it is understood that he may do it; the Court has not the means of enforcing a settlement by interfering with his remedies at law. These are the general rules which have been established by a course of practice under this peculiar doctrine of the Court, and which has been steadily and uniformly observed, for above a century past. Lord Keeper *Wright*, in *Oxenden* v. *Oxenden*, 2 *Vern.* 494. *Bosvil* v. *Brander*, 1 *P. Wms.* 459. *Jacobson* v. *Williams*, 2 *P. Wms.* 382. *Brown* v. *Elton*, 3 *P. Wms.* 202. *Jewson* v. *Moulson*, 2 *Atk.* 417. *Grey* v. *Kentish*, 1 *Atk.* 280. *Burden* v. *Dean*, and *Oswell* v. *Robert*, 2 *Ves. jun.* 607, 680. *Brown* v. *Clarke*, 3 *Vesey*, 166. *Lump* v. *Milnes*, 5 *Vesey*, 517. *Vide* also 1 *Vesey*, 539. 1 *Ves.* & *Beame*, 300, and *Murray* v. *Elibank*, 13 *Ves.* 1.)

In the case before me there are sufficient reasons for requiring some provision for the wife out of the fund in question. Though there be real property of the wife still undisposed of, yet the husband has a life estate in it, and her residuary interest would not be very productive. The fact has also occurred, that she has been left for years unsupported by her husband, in consequence of his unavoidable absence; and it appears from the master's report, that his means of living are small, and the exercise of his maritime profession unusually hazardous. Under these circumstances, provision ought to be made for the wife out of the moneys now due to her from her father's estate, before the husband can receive the aid of the Court.

I shall, therefore, suspend the decree, and recommend, in the mean time, that the amount of 1,000 dollars be secured for the wife and child, by an amicable arrangement between the parties, and that the residue be paid over to the husband. If this recommendation be not effective, I will then make some direction in the case.

N. B. The arrangement recommended took place, and the cause was not brought again before the Court.

In FANNING *v.* DUNHAM (1821) 5 *Johns. Ch.* 122, 142, CHANCELLOR KENT said: With respect to the relief that can be afforded here I take the rule to be, that a plaintiff who comes to a Court of Equity for relief against a judgment at law, or other legal security, on the ground of usury, cannot be relieved, except upon the reasonable terms of paying to the defendant what is really and *bona fide* due to him. On the other hand, if the party claiming under such usurious judgment, or other security, resorts to this Court to render his claim available, and the defendant sets up and establishes the charge of usury, the Court will decide according to the letter of the statute, and deny all assistance, and set aside every security and instrument whatsoever, infected with usury. It is perfectly immaterial, in respect to the application of the principle

to the case of the debtor who sues here, whether the usury be confessed by the defendant in his answer, or be made out by proof. The plaintiff must still consent to do what is just and equitable on his part, or the Court will not assist him, but leave him to make his defence at law, as well as he can. The case of *Taylor* v. *Bell,* (2 *Vern.* 171.) is a striking, but very harsh illustration of the rule. The plaintiff had given bonds with sureties, for moneys borrowed at usury, and a warrant to confess judgment, and judgment was entered thereon. He then brought his bill to be relieved, and for an account, and though the answer confessed the facts from which the usury was deduced, relief was denied, and he was ordered to pay principal, interest, and costs. So, in a late case in the Exchequer, (*Skyrne* v. *Rybot,* cited in *Orde on Usury,* 113.) where a bond and warrant of attorney was taken in an usurious transaction, the decree was, to take an account of the money really paid, and that on payment thereof, the bond and warrant of attorney were to be delivered up. In *Scott* v. *Nesbit,* (2 *Bro.* 641. 2 *Cox,* 183.) we have this strong observation of Lord *Thurlow:* "I take it to be an universal rule," he observes, "that if it be necessary for you to come into this Court to displace a judgment at law, you must do it upon the equitable terms of paying the principal money really due, with lawful interest. I have no idea of displacing a judgment upon any other terms." He directed, in that case, that the judgment should stand as a security for the money actually paid, with legal interest.

The equity cases speak one uniform language; and I do not know of a case in which relief has ever been afforded to a plaintiff, seeking relief against usury, by bill, upon any other terms. It is the fundamental doctrine of the Court. Lord *Hardwicke* (1 *Vesey,* 320.) said, that in case of usury, equity suffers the party to the illicit contract to have relief, but whoever brings a bill, in case of usury, must submit to pay principal and interest due. Lord *Eldon,* (3 *Ves.* & *Bea.* 14.) after an interval of more than sixty years, declared precisely the same rule. At law, says he, you must make out the charge of usury, and at equity, you cannot come for relief, without offering to pay what is really due; and you must either prove the usury by legal evidence, or have the confession of the party. In *Eagleson* v. *Shotwell,* (1 *Johns. Ch. Rep.* 536.) the same rule followed in this Court, where a party came to be relieved against usury in a mortgage.

I have been thus particular in showing the rule of equity on this subject, because the plaintiff has sought by his bill to have all the securities taken by the defendant, and infected with usury, declared void, and ordered to be cancelled, without offering to pay any thing. His counsel have also contended, at the hearing, that the rule in equity, where the defendant either confesses the usury, or it is established by testimony, is the same as it is when usury is set up as a defence to a demand in law or equity. All that I can do in this case, consistently with my view of the established doctrine of the Court is, to direct an account to be taken

of the dealings between the parties, and to hold the securities which the defendant has taken, to be good only for the balance which may appear to be due to the defendant, after deducting all usurious excess in any of his commissions and charges.

The objection that presses upon the subject is, that the statute of usury may be, in a great degree, eluded, by taking a judgment bond, which precludes the debtor from an opportunity of pleading the usury in a Court of law; and if he can only be relieved upon the principles of a Court of Equity, or by the summary powers of a Court of law, acting upon equitable principles, the usurious creditor is sure to preserve his principal sum, and the lawful interest. But this objection was for a long time perceived, and felt, and endured in the Courts of law, before any remedy could be applied; and though they interfered, at first, most effectually, by vacating the warrant of attorney, and allowing the party to come in and plead, they seem now to have abandoned the case to equitable relief, and to choose to administer no other. It is the folly of the party to have precluded himself from pleading, by confessing judgment. *Leges vigilantibus non dormientibus subveniunt.* At any rate, though it were even to be regretted, that Courts of law cannot place the debtor in a condition to be enabled to annul the contract altogether, under the sanction of the statute; yet certainly I should introduce a new principle into this Court, if I was now to undertake to displace a judgment at law, upon any other terms than those I have mentioned.

The same objection and difficulty occur in the case of a mortgage taken to secure an usurious loan, with a power to sell, annexed to it, by means of which the creditor forecloses his mortgage by an act *in pais,* without calling upon any Court to assist him. The debtor has no relief in that case, but by applying to this Court, and then he must comply with the terms of paying what was actually advanced. He deprives himself, in that case, by the power to sell, as he does in the other, by his warrant of attorney to confess judgment, of an opportunity to appear in the character of defendant and plead the usury. These are cases in which the party, by his own voluntary act, deprives himself of his ability to inflict upon the creditor the loss of his entire debt. Many other cases may be stated in which the same result will follow. The party is in the same situation if, instead of resisting the usurious claim, he pays it. He cannot then expect assistance to recover back more than the usurious excess. If the warrant of attorney, or the power to sell, were procured by fraud, or surprise, or accident, that would form a distinct head of relief, and in no wise applicable to the case. And, perhaps, it is sufficient for the purposes of public justice, and public policy, that the law has enabled a debtor, in every case, in which he does not of his own accord deprive himself of the means, to plead the statute in discharge of his usurious contract, and of his obligation to pay even what was received, and that in all cases he can, by paying the actual principal received, and the lawful interest, be relieved from the usurious exaction.

HANSON *v.* KEATING.

IN CHANCERY, BEFORE VICE-CHANCELLOR WIGRAM, 1844.[1]

[4 *Hare* 1.]

Husband and wife assigned by way of mortgage the equitable interest of the husband in right of his wife in a term of years. The mortgagee filed his bill against the husband and wife and the trustee of the legal estate, for a foreclosure and assignment of the term.[2]

VICE-CHANCELLOR:—

The argument in this case for the Defendant Mrs. *Keating* was founded upon the well established rule of this court, that the plaintiff who would have equity must do equity,—a rule by which, properly understood, it is at all times satisfactory to me to be bound. But it is a rule which, as it was used in the argument of this case, takes for granted the whole question in dispute. The rule, as I have often had occasion to observe, cannot per se decide what terms the Court should impose upon the plaintiff as the price of the decree it gives him. It decides in the abstract, that the Court, giving the plaintiff the relief to which he is entitled, will do so only upon the terms of his submitting to give the defendant such corresponding rights (if any) as he also may be entitled to in respect of the subject-matter of the suit;—what these rights are must be determined aliunde by strict rules of law, and not by any arbitrary determination of the Court. The rule, in short, merely raises the question what those terms (if any) should be. If, for example, a plaintiff seeks an account against a defendant, the Court will require the plaintiff to do equity by submitting himself to account in the same matter in which he asks an account;—the reason of which is, that the Court does not take accounts partially, and perhaps ineffectually, but requires that the whole subject be, once for all, settled between the parties. It is only (I may observe as a general rule) to the one matter which is the subject of a given suit that the rule applies, (*Whitaker* v.

[1] Wigram is the author of two classics of the profession: An Examination of the Rules of Law respecting the Admission of Extrinsic Evidence in the Interpretation of Wills (1831); Points in the Law of Discovery (1836).

Of his standing and services as a judge Mr. Foss may be quoted: "Sir James Wigram presided over his court for nine years (1841-1850), his decrees being remarkable for the lucid exposition of the legal principles involved in the cases on which he had to adjudicate. They were the subject of general approbation, and were highly extolled by those most competent to form a judgment. As reported by Mr. Thomas Hare, all of them have the special advantage of having been seen and approved by the judge before publication." (Lives of the Judges.)

[2] This statement of the case is taken from the headnote.

Hall, 1 *Glyn & Jam.* 213), and not to distinct matters pending between the same parties. So, in the case of a bill for specific performance, the Court will give the purchaser his conveyance, provided he will fulfil his part of the contract by paying the purchase-money; and, e converso, if the vendor were plaintiff, the Court will assist him, only upon condition of his doing equity by conveying to the purchaser the subject of the contract upon receiving the purchase-money. In this, as in the former case, the Court will execute the matter which is the subject of the suit wholly, and not partially. So, if a bill be filed by the obligor in an usurious bond, to be relieved against it, the Court, in a proper case, will cancel the bond, but only upon terms of the obligor refunding to the obligee the money actually advanced. The reasoning is analogous to that in the previous cases. The equity of the obligor is to have the entire transaction rescinded. The Court will do this, so as to remit both parties to their original positions: it will not relieve the obligor from his liability, leaving him in possession of the fruits of the illegal transaction he complains of. I know of no case which cannot be explained upon this or analogous reasoning; and my opinion is, that the Court can never lawfully impose merely arbitrary conditions upon a plaintiff, only because he stands in that position upon the record, but can only require him to give the defendant that which by the law of the court, independently of the mere position of the party on the record, is the right of the defendant in respect of the subject of the suit. A party, in short, does not by becoming plaintiff in equity give up any of his rights, or submit those rights to the arbitrary disposition of the Court. He submits only to give the defendant his rights in respect of the subject-matter of the suit, on condition of the plaintiff obtaining his own. Cases may perhaps be suggested (some cases of retainer, for example) in which a question never can arise except against a plaintiff; but, as a general proposition, it may, I believe, be correctly stated, that a plaintiff will never, in that character, be compelled to give a defendant anything but what the defendant might, as a plaintiff, enforce, provided a cause of suit arose: *Lady Elibank* v. *Montolieu,* 5 *Ves.* 737, *Sturgis* v. *Champneys,* 5 *Myl. & Cr.* 102.

I have gone at length into this question, because the opinion I have expressed—which I intimated during the argument—was combated with great earnestness, and was said to be opposed to the opinion of Lord *Cottenham* in *Sturgis* v. *Champneys.* I do not so understand Lord *Cottenham* in that case, or I should at once defer to his judgment. But I do know, that, in one of his most elaborate and able judgments,—I mean that in *Brown* v. *Newall,* 2 *Myl. & Cr.* 558, and with equal clearness in *Agabeg* v. *Hartwell,* in the House of Lords, 5 *Cl. & Fin.* 484, *nom.,*—he held, that a party loses none of his rights by becoming plaintiff in a suit in equity. The Vice-Chancellor of *England,* and Lord *Brougham,* on appeal, upon the general ground that he who would have equity must do equity, required the plaintiff in the latter cause to

submit to an account of certain monies he had in his hands, in which the defendants claimed an interest, as the price of a decree for an account against the defendants; there being no necessary connexion between the two accounts. This decree, therefore, went to the House of Lords under every circumstance of disadvantage. The House of Lords investigated the case with a view to the question, whether the defendants were entitled to have the two accounts blended; and being of opinion that the defendants had no such equity, the decree was reversed.

I am clear, therefore, that I am not bound in this case to impose upon the Plaintiff the terms required by the Defendant, only because he is Plaintiff, (for that was the argument at the bar). The question is, what are the equitable rights of the parties independently of their relative positions on the record. *Sir Edward Turner's case,* 1 *Vern.* 7, if it be law, answers this question. Now it is true, that some judges have thought the resolutions in that case questionable; but it is equally true, that they have considered it as binding upon all courts until the House of Lords should alter its own resolutions: *Pitt* v. *Hunt,* 1 *Vern.* 18, *Jewson* v. *Moulson,* 2 *Atk.* 417; and, unless I am altogether under a mistake, *Sir Edward Turner's case* has always been, and is at this day, considered law by conveyancers, and is acted upon accordingly. And the more strong has been the dissent from the resolutions in that case, the more do the judges who express that dissent affirm the authority of the case by following it. I believe the understanding of the Profession prior to the decision in *Sturgis* v. *Champneys* to have been, that *Sir Edward Turner's case* was in accordance with the principles of the Court, and I advert to that understanding the more, not only because the Vice-Chancellor of *England* concurs in it, but because I know the learned editor of Mr. *Roper's* book on the Law of Husband and Wife always lamented the decision in *Sturgis* v. *Champneys* as having in his opinion unsettled the law. In some cases of mere personalty there is no doubt of the wife's equity. But prior to *Sturgis* v. *Champneys,* the opinion of the Profession had, I believe, become settled, that estates in land were not subject to the same equity, upon the broad and important principle of preserving a strict analogy between legal and equitable estates in land. In the case of *Burdon* v. *Dean,* 2 *Ves. jun.* 607, the order was made by consent, and Lord *Cottenham* notices that circumstance in *Sturgis* v. *Champneys.*

I shall not, however, decide this case without attentively reading *Sturgis* v. *Champneys* in private.

VICE-CHANCELLOR:—

At the close of the argument in this case, I stated what my understanding of the law was; and I reserved to myself the duty only of examining the case of *Sturgis* v. *Champneys,* to determine whether I could act in this case upon my individual opinion as to the law, without directly impugning the plain tenor of Lord *Cottenham's* judgment in that case. My opinion is that I cannot do so, and therefore, in deference

to that judgment, I shall follow it, although, if that case were out of the way, I should probably have decided otherwise. There would be no difficulty in distinguishing the facts of this case from those in *Sturgis* v. *Champneys;* but the reasoning in that case would remain, and I cannot disregard it.

"The invariable maxim of equity is that he who asks equity must do it. But this maxim is confined exclusively to the cases in which there is an equity between the parties, where, although the plaintiff is entitled to relief, he yet owes in conscience, though possibly not at law, a debt or duty to the defendant. *Francis's Max.* 1. In such cases relief is given on condition that the plaintiff does what in conscience he is bound to do to the defendant. An equity which any third person may have against the plaintiff can never be available, under this maxim, to the defendant."—*Garland* v. *Rives* (1862) 4 *Rand.* 282, 308.

The rule is applied to a defendant setting up an equitable defence. "But the maxim 'He who seeks equity must do equity' is as appropriate to the conduct of the defendant as to that of the complainant; and it would be strange of a debtor to destroy equality and accomplish partiality, could ignore its long acquiescence and plead an unsubstantial technicality to overthrow protracted, extensive and costly proceedings carried on in reliance upon its consent. Surely no such imperfection attends the administration of a court of equity. Good faith and early assertion of rights are essential on the part of the defendant as of the complainant."—*Brown* v. *Lake Superior Iron Co.* (1889) 134 *U. S.* 530, 535.

The maxim applies only to equities arising out of the same transaction, *Whitaker* v. *Hall* (1822) 1 *G.* & *J.* 213, not to unconnected matters, *Wilson* v. *Fowkes* (1852) 9 *Hare* 592, and the equity must respect the subject matter of the suit. *Gibson* v. *Goldsmid* (1854) 5 *De G. M.* & *G.* 757; *U. S.* v. *McRae* (1867) *L. R.* 3 *Ch. app.* 79.

Pomeroy considers the maxim as "not wholly a rule for the guidance of the equity judge in measuring out and apportioning reliefs among litigants. It has exercised a moulding influence in the development of important branches of the equity jurisprudence; certain doctrines are plainly derived from it as their chief though not perhaps their only source." After naming and briefly discussing the doctrines of *election* and *marshalling* as being derived from the maxim, he concludes: "A few other doctrines might, I think, be specified as thus related by a common descent: but enough has already been said to show the great importance of the principle. He who seeks equity must do equity, both as a practical rule governing the administration of remedies, and as the germ of equitable doctrines."—1 *Equity Jurisprudence*, §§ 394, 395, 396.

Mr. Phelps considers this to be one of the maxims that "stand pre-eminently for *conscience*." He regards it as "of universal and constant application in every variety of case in which a plaintiff seeks to set in motion the machinery of equity for purposes of injustice or oppression, or to secure an undue advantage, or to profit by his own wrong, or in spite of his own neglect." He considers its applications to be the Wife's Equity, Estoppel, Election, Injunction (in certain actions), Partition, Compensation, and Breach of Trust.—Judicial Equity, §§ 244-255.

D.—He Who Seeks Equity Must Come in with Clean Hands.

RICH *v.* SYDENHAM.

In Chancery, before Lord Keeper Ashley, 1672.

[1 *Cases in Chancery* 202.]

The plaintiff upon the loan of 90 *l.* had gotten a bond from the defendant of 1600 *l.* for payment of 800 *l.* and judgment thereupon. The defendant in the right of his wife was entitled to certain lands that were estated in other persons in law in trust for her.

The bill was to have those lands subjected to the plaintiff's satisfaction here, inasmuch as the defendant was entitled to the trust in the right of his wife.

But the security being gotten from the defenydant when he was drunk, the Lord Keeper would not give the plaintiff any relief in equity, not so much as for the principal he had really lent; and so the bill was dismissed.[1]

BODLY *v.* ———.

In Chancery, before Lord Chancellor Nottingham, 1680-81.

[2 *Cases in Chancery* 15.]

Bodly gave bond of 500 *l.* to the brother of the defendant, conditioned to pay to the defendant's sister (partly also to the bill) 50 *l.* and to maintain a base child paying a certain yearly sum for it. There was no place in the condition where the 50 *l.* should have been paid. The plaintiff by his bill offers payment of the 50 *l.* and brought it into court, and the defendant set forth by answer that the plaintiff was suiter to her in way of marriage, but abused her and left her, and thereupon the court refused to grant an injunction to the plaintiff against the suit on the

[1] "A suit in equity is an appeal for relief to the moral sense of the chancellor. A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty, and reasonable diligence will move it to action. Its decree is the exercise of discretion,—not of an arbitrary and fickle will, but of a wise judicial discretion, controlled and guided by the established rules and principles of equity jurisprudence. One of the most salutary of these principles is expressed by the maxims, "He who comes into a court of

bond; the plaintiff replied and acknowledged he was a suitor, and really intended marriage, but that after he had begun to woo the woman, he was informed, as the truth was, that she had formerly been taken in a bed with another man, and that this was known publicly, and her father trepanned him to woo her, &c. he being a young man in Oxford. Yet now the Lord Chancellor denied the injunction saying, this court should not be a court to examine such matters.

THE HIGHWAYMAN'S CASE.

EXCHEQUER, 1725.

[2 *Evans' Pothier on Obligations*, 3, *n.* 1.[1]]

The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, &c.; that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the road, and at inns, taverns, or ale houses, or at markets, or fairs.

"And your orator, and the said Joseph Williams proceeded jointly in the said business with good success on Hounslow-Heath, when they dealt with a gentleman for a gold watch, and afterwards the said Joseph Williams told your orator that Finchley, in the County of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley aforesaid, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the said Joseph Williams informed your orator that there

equity must come with clean hands," and "He who has done iniquity cannot have equity." A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty, or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit. 19 L. Ed. 955."—Michigan Pipe Co. *v.* Freem Ditch etc. Co. (1901) 111 *Fed.* 285, at 287, *Sanborn, Circuit Judge.*

[1] This case, under the name of Everett *v.* Williams, was originally reported in European Magazine for May, 1787, vol. 1, 360.

was a gentleman at Blackheath who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which he believed might be had for little or no money; that they accordingly went, and met with the said gentleman, and after some small discourse they dealt for the said horse, &c.; that your orator and the said Joseph Williams continued their joint dealing together until Michaelmas, and dealt together in several places, *viz.*, at Bagshot in Surrey, Salisbury in Wiltshire, Hampstead in Middlesex, and elsewhere to the amount of £2,000 and upwards."

The rest of the bill is in the ordinary form for a partnership account. 3d October, 1725, on the motion of Sergeant *Girdler,* the bill referred for scandal and impertinence. 29th November, report of the bill as scandalous and impertinent confirmed; and order to attach White and Wreathcock, the solicitors. 6th December. The solicitors brought into court and fined £50 each; and ordered that Jonathan Collins, Esq., the counsel who signed the bill, should pay the costs. The plaintiff was executed at Tyburn in 1730, the defendant at Maidstone in 1735. Wreathcock, the solicitor, was convicted of robbing Dr. Lancaster in 1735, but reprieved and transported.[1]

McMULLEN *v.* HOFFMAN (1898) 174 *U. S.* 639, 654.—MR. JUSTICE PECKHAM. There are several old and very familiar maxims of the common law which formulate the results of that law in regard to illegal contracts. They are cited in all law books upon the subject and are known to all of us. They mean substantially the same thing and are founded upon the same principles and reasoning. They are: *Ex dolo malo non oritur actio; Ex pacto illicito non oritur actio; Ex turpi causa non oritur actio.* About the earliest illustration of this doctrine is almost traditional in the famous case of *The Highwayman.* It is stated that Lord Kenyon once said, by way of illustration, that he would not sit to take an account between two robbers on Hounslow Heath, and it was

[1] In Ridler *v.* Moore (1797) Clifford's Southwark Election Cases, 371, KENYON, C. J., is reported to have said: "He had heard of a bill filed in the Court of Chancery, to obtain an account of the profits of a partnership trade carried on at Hounslow, but when it appeared that the trade was taking the purses of those who travelled over the heath, the Court would not endure it."

In a still earlier case, (before LORD MANSFIELD) Faikney *v.* Reynons (1767) 4 Burr. 2069, 2071, the principal case was cited as an authority by counsel.

The case was long regarded as a jest or hoax of some equity draftsman, but a careful examination of the original records by Sir Frederick Pollock has established its genuineness. As Sir Frederick exclaims: "Truth is stranger than fiction!" See 9 Law Quarterly Review, 105, 197-199.

questioned whether the legend in regard to the highwayman did not arise from that saying. It seems, however, that the case was a real one. He did file a bill in equity for an accounting against his partner, although it was no sooner filed and its real nature discovered than it was dismissed with costs, and the solicitors for the plaintiff were summarily dealt with by the court as for a contempt in bringing such a case before it. (1 Lindley on Partnership, 5th ed. 94, note *n*; 9 Law Quarterly Review, (London) pp. 105—197.

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any illegal rights directly springing from such contract. In cases of this kind the maxim is *Potior est conditio defendentis.*

The following are only a few of the numerous cases upon the subject in England and in this country: *Holman* v. *Johnson,* (1775) 1 Cowper, 341; *Booth* v. *Hodgson,* (1795) 6 T. R. 405; *Thomson* v. *Thomson,* (1802) 7 Ves. 468; *Shiffner* v. *Gordon,* (1810) 12 East, 296; *Sykes* v. *Beadon,* (1879) L. R. 11 Ch. Div. 170; *Scott* v. *Brown,* (1892) 2 Q. B. D. 724; *Belding* v. *Pitkin,* (1804) 2 Caines, 147*a; Atcheson* v. *Mallon,* (1870) 43 N. Y. 147; *Leonard* v. *Poole,* (1889) 114 N. Y. 371; *Wheeler* v. *Russell,* (1821) 17 Mass. 258, 281; *Snell* v. *Dwight,* (1876) 120 Mass. 9; *Marshall* v. *Baltimore & Ohio Railroad Co.,* (1853) 16 How. 314, 334; *McBlair* v. *Gibbes,* (1854) 17 How. 232; *Coppell* v. *Hall,* (1868) 7 Wall. 542; *Trist* v. *Child,* (1874) 21 Wall. 441, 448; *Woodstock Iron Company* v. *Richmond & Danville Extension Co.,* (1888) 129 U. S. 643; 1 Lindley on Partnership, 5th ed. 93, note, giving the result of the American cases.[1]

[1] "The plaintiff, on the fraudulent representations that a foot race had been 'fixed' and that he would be allowed to share in the winnings, was induced to bet money of the defendants, as though it was his own. He was also persuaded to put up $5,000 of his own with the stake holder "to make a showing," as he was informed in the event a count of the stake money was demanded. As a matter of fact all the money [bet] on both sides belonged to the defandants, who had thus conspired to swindle the plaintiff. *Held,* although the plaintiff was in *delicto,* he was not in *pari delicto* with the conspirators, and when the plaintiff demanded back his money before the pretended race was run, the plea of moral turpitude constituted no defence. *Wright* v. *Stewart et al.* (1904) 130 *Fed.* 905.

"The law encourages a repudiation of an illegal contract and allows a *locus peritential* to the guilty participator as long as it remains an executory contract and the illegal purpose is not put into execution. Bernard *v.* Taylor (1893) 23 *Ore.* 416. It has been held otherwise after the delictum has been consummated. Abbe *v.* Marr (1859) 14 Cal. 210; Anonymous (1889) 10 Ohio Dec. 649. There is a decided tendency among courts and text-writers to distinguish between degrees of guilt in such cases on the theory that the delib-

DERING *v.* EARL OF WINCHELSEA.

IN CHANCERY, BEFORE LORD CHIEF BARON EYRE, 1787.

[1 *Cox Chancery* 318.]

Thomas Dering, Esq. having been appointed collector of some of the duties belonging to the customs, it became necessary upon such appointment for him to enter into bonds to the crown with three securities for the due performance of this office. Sir Edward Dering his brother, the Earl of Winchelsea, and Sir John Rous, having agreed to become sureties for him, a joint and several bond was executed by Thomas Dering and Sir Edward Dering to the crown in the penalty of 4000 *l.*, another joint and several bond by Thomas Dering and the Earl of Winchelsea, and a third by Thomas Dering and Sir John Rous in the same penalty of 4000 *l.*, all conditioned alike for the due performance of Thomas Dering's duty as collector. Mr. Dering being in arrear to the crown to the amount of 3883 *l.* 14 *s.*, the crown put the first bond in suit against Sir Edward Dering, and judgment was obtained thereon for that sum: whereupon Sir Edward filed his bill against the Earl of Winchelsea and Sir John Rous, claiming from them a contribution towards the sum so recovered against him.

The cause had been argued at length, in Michaelmas Term last, and now stood for judgment.

Lord Chief Baron [EYRE].—This bill is brought by one surety against his two co-sureties, under the circumstances above mentioned. Mr. Dering's appointment, the three bonds, and the judgment against the plaintiff, are in proof in the cause; the original balance due, and the present state of it, are admitted. The demand is resisted on two grounds: 1st, that there is no foundation for the demand in the nature of the contract: and 2dly, that the conduct of Sir Edward Dering has been such as to disable him from claiming the benefit of the contract, though it did otherwise exist. There is also a formal objection which I shall take notice of hereafter. I shall consider the second ground of objection first, in order to lay it out of the case. The misconduct imputed to Sir Edward is, that he encouraged his brother in gaming and other irregularities; that he knew his brother had no fortune of his own, and must necessarily be making use of the public money, and that Sir Edward was privy to his brother's breaking the orders of the Lords of the Treasury, to keep the money in a particular box, and in a particular

crate swindler should not be able to protect himself by the legal maxim '*In pari delicto potior est conditio possidentis.*' *Pomeroy, Equity II, Sec.* 942; *Smith* v. *Blackley* (1898) 188 *Pa. St.* 550; *Timmerman* v. *Bidwell* (1886) 62 *Mich.* 205." 4 *Columbia Law Review* 604.

manner, &c. This may all be true, and such a representation of Sir Edward's conduct certainly places him in a bad point of view; and perhaps it is not a very decorous proceeding in Sir Edward to come into this court under these circumstances: he might possibly have involved his brother in some measure, but yet it is not made out to the satisfaction of the court, but these facts will constitute a defence. It is argued that the author of the loss shall not have the benefit of a contribution; but no cases have been cited to this point, nor any principle which applies to this case. It is not laying down any principle to say that his ill conduct disables him from having any relief in this court. If this can be founded on any principle, it must be, that a man must come into a Court of Equity with clean hands; but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense.[1] In a moral sense, the companion, and perhaps the conductor, of Mr. Dering, may be said to be the author of the loss, but to legal purposes, Mr. Dering himself is the author of it; and if the evil example of Sir Edward led him on, this is not what the court can take cognizance of. Cases indeed might be put in which the proposition would be true. If a contribution were demanded from a ship and cargo for goods thrown overboard to save the ship, if the plaintiff had actually bored a hole in the ship, he would in that case be certainly author of the loss, and would not be entitled to any contribution. But speaking of the author of the loss is a mere figure of speech as applied to Sir Edward Dering in this case.[2]

[1] The earlier form of the maxim seems to have been, "He that hath committed iniquity, shall not have equity."—*Francis, Maxims of Equity* 5, where a number of early cases involving the principle are cited and digested.

Mr. Spence cites this passage with the remark that this principle is a "descendant" of the other, He who seeks equity must do equity.—1 *Spence, Jurisdiction of the Court of Chancery* 423, *n.* (*a*).

As to what circumstances will constitute such a legal iniquity see Wardour *v.* Berisford (1687) 1 *Vern.* 452, when a defendant had a degree on a bill for an accounting of personal estate of a deceased, because the plaintiff had broken the seal of a packet of papers containing the statements of the account, which had been sealed by the deceased and left in the plaintiff's hands. It does not appear in the case that any papers were shown to be missing or tampered with, though a reporter's note states that the entry in the *Reg. Lib.* shows that the court found that some of the papers were missing.

[2] The balance of the opinion, relating to contribution among co-sureties, has been omitted.

CADMAN *v.* HORNER.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., 1810.[1]

[18 *Vesey Junior* 10.]

The Bill prayed the specific performance of an agreement, by which the Defendant contracted to sell the fee-simple of certain premises for the sum of 600*l.*, payable by instalments. The agreement was signed by both parties; and the Defendant having received part of the purchase-money, resisted the performance on the ground, that the Plaintiff, who was his agent, had misrepresented the value of the estate; producing evidence, that it was worth near 1200*l.*; also that, the Plaintiff had previously to the agreement represented to him, that the houses had been injured by a flood, and would require between 50*l.* and 60*l.* to repair them; whereas in truth the premises at the time of the contract required no more than forty shillings to put them in complete repair. No evidence of the value of the premises was entered into by the Plaintiff: but the Defendant in his answer admitted, that the clear yearly rent amounted to 49*l.*; and stated, that in 1805 he had purchased these premises for 700*l.*; and had afterwards expended 300*l.* in repairing them.

The MASTER *of the* ROLLS.

The evidence of the inadequacy of the price in this case is considerably shaken by the Defendant's admission of the clear rent of the premises. It is difficult to conceive, that he could be ignorant of the value; having

[1] Lord Kingsdowne considered Sir William Grant the ideal and model judge, even superior to Lord Eldon. Indeed, Sir Samuel Romilly suggested that the surest way to work off Lord Eldon's arrears was to confine Eldon to his quarters and have Grant sit for him, or to quote the exact language: "A year's illness of His Lordship would enable the Master of the Rolls, who, upon such occasions was always accustomed to supply the Chancellor's place, to get rid, with his ordinary despatch of business, of the whole arrear." Memoirs of Sir Samuel Romilly, vol. III., 186.

The greatness of Sir William Grant was not lost upon the noble Lord himself. For example: "I feel therefore a strong inclination of opinion upon this question; but I shall not hold any opinion of my own without doubt, where the Master of the Rolls has held directly the contrary." [James *v.* Dean (1804-5) 11 Ves. 383, 391.] And on another and later occasion Lord Eldon said: "I feel that, in differing, in case I should find myself bound to differ from so great a judge, my own decision will not hereafter possess all the authority which might otherwise attach to it." [Mills *v.* Farmer (1815) 1 Meriv. 55, 94.]

The following summing up of the qualities of this great judge may well be permitted: "Though Grant had acquired a far greater reputation as a parliamentary orator than as a leader of a chancery bar, his success as a judge was remarkable. Charles Butler declared that 'The most perfect model of judicial eloquence' which had come under his observation was that of Sir William Grant.

so recently purchased the estate; and laid out money in the improvement of it; and it is not easy to comprehend his conduct: nor does misrepresentation by the Plaintiff in regard to what was requisite for the repairs of the houses by any means account for the disparity between the price, paid for the estate, and the sum, at which the witnesses value it: yet, as upon the evidence the Plaintiff has been guilty of a degree of misrepresentation, operating to a certain, though small, extent, that misrepresentation disqualifies him from calling for the aid of a Court of Equity; where he must come, as it is said, with clean hands. He must, to entitle him to relief, be liable to no imputation in the transaction. *Viscount Clermont* v. *Tasburgh,* 1 *Jac.* & *Walk.* 112. *Wall* v. *Stubbs,* 1 *Madd.* 80. This is not a case, where the Court is called upon to rescind an agreement, and to decree the conveyance, executed in pursuance of it, to be delivered up to be cancelled; which would admit a different consideration. *Savage* v. *Brocksopp,* VI, 328, and the notes, 341. post, 335. Ante, *Marquis* of I, 226. *Lowndes* v. *Lane, Townshend* v. *Stangroom,* Vol. 2 *Cox,* 263.

The Bill was dismissed without costs.[1]

'His exposition of facts, and of the consequences deducible from them, his discussion of former decisions, and showing their legitimate weight and authority, and their real bearings upon the point in question, were above praise; but that the whole was done with such admirable care and simplicity that, while real judges felt its supreme excellence, the herd of hearers believed that they should in his 'Diary,' referring to Grant's resignation, says: 'His eminent qualities have done the same.' Reminiscences, 4th edition, I, 134-5. While Romilly as a judge, his patience, his impartiality, his courtesy to the bar, his despatch, and the masterly style in which his judgments were pronounced, would at any time have entitled him to the highest praise.' Memoirs, 1840, III., 324-5. Though a tory in politics, Grant supported Romilly's reform of the criminal law, while his speech in defence of the definitive treaty of peace actually secured the approbation of Bentham, who pronounced him to be 'an animal *sui generis* amongst lawyers, and indeed amongst parliamentary men,' and added, 'The notions of the master about colonies approach nearer to what I call reason than those of almost anybody else I have met with.'" Dictionary Biography, Article, Grant.

Finally, it may be said that Lord Kingsdowne considered Sir William Grant as second only, if indeed second only, to Lord Stowell in the domain of international law.

[1] "The misconduct of Mosher was intimately connected with the entire matter in litigation here. It was in relation to a part of the common fund and property which is the subject of the action. The court might therefore according to the settled maxims of equity jurisprudence, decline to act at plaintiff's instance. Discussing the principle on which courts of equity refuse to act in the enforcement of unconscionable claims, Mr. Pomeroy says: 'It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject-matter or transaction in question. It says that whenever

MASSI *v.* LAVINE.

IN THE SUPREME COURT OF MICHIGAN, 1905.

[102 *Northwestern Reporter* 665.]

Suit by August Massi and another against Morris Lavine and another. From a decree for the defendants, the complainants appeal.

The purpose of this suit is to obtain the cancellation of a deed made by complainants to defendant Morris Lavine. The complainant Massi was surety on a bond for $500. Being threatened with suit on it, he deeded to the defendant property worth $2,500, in order, as he alleged, to avoid liability on this bond, it being understood between the parties that the defendant should deed the property back when "the trouble was over." The defendant insisted the whole transaction was bona fide, and that he had given value for the property.[1]

GRANT, J. (after stating the facts). The main issue of fact in the case is, was the sale a bona fide one, and the consideration paid, or was the title transferred to assist the complainant August Massi to avoid the payment of a debt? Upon this the testimony was in direct conflict. There is no room to find that either is mistaken. Either the one or the other has committed perjury. Each has produced some corroborating evidence to support his version. We find it unnecessary to determine this controversy, as the case must be determined upon the complainants' own evidence.

a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him in remedy.' (1 *Pomeroy, Equity Jurisprudence,* sec. 397.) A familiar illustration of the doctrine is found in cases where courts have declined to grant specific performance of valid contracts, because unfairly obtained. The plaintiff in this case bases his action on an unconscionable claim. He occupies no higher ground than his assignor. Without offering to do equity, he has no claim upon a court of conscience." *Lewis* v. *Holdredge* (1898) 56 *Neb.* 379, 382.

"It is not every unfounded claim which a man may make, or unfounded defence which he may set up, which will bar him from proceeding in a court of equity. The rule that he who comes into equity must come with clean hands must be understood to refer to wilful misconduct in regard to the matter in litigation. *Snell's Principles* 35. All the illustrations given in *Francis*, p. 5, under the maxim, as he states it, 'He that hath committed iniquity shall not have equity' show this." *Lewis & Nelson's Appeal* (1870) 67 *Pa. St.* 153, 166.

See note to the principal case as reported in *Summer's Edition of Vesey.*

[1] The statement of facts has been abridged.

No fiduciary or confidential relation existed between Mr. Massi and Mr. Lavine. They were dealing with each other at arm's length. They had had various business transactions together for some years. The land conveyed is conceded to be worth $2,500, the consideration expressed in the deed. The bond signed by Mr. Massi with another bondsman was for $500. He claims that he was threatened only with the payment of $115. This was contingent upon his principal, the administratrix, not performing her duty. The letter which he relies upon as containing the threat to enforce the claim against him only asked him to see that the administratrix performed her duty. He apparently took no steps to that end. He was accustomed to business affairs. He had 80 acres of land besides that involved in this suit, which he did not transfer. I can reach no other conclusion from his own testimony than that he conveyed this land, worth $2,500, to avoid a liability of only $115. He does not come into court with clean hands, and equity will leave him in the bed he chose to make. Under his own testimony, he is not entitled to relief. The record does not justify a finding that this is a case where the stronger has overpowered the weaker, or the superior has taken advantage of the inferior, and by his persuasion and influence has procured an unlawful act to be done. The case falls within Poppe *v.* Poppe, 114 Mich. 649, 72 N. W. 612, 68 Am. St. Rep. 503.

The decree is affirmed, with costs.[1]

[1] "The statute 13 *Eliz.* c. 5, against fraudulent conveyances, applies to contingent liability, *Gannard* v. *Eslava* (1852) 20 *Ala.* 732, 741; hence to sureties. *Bay* v. *Cook* (1863) 31 Ill. 337, 347. Such a conveyance is valid as between the parties, *Proseus* v. *McIntyre* (1849) 5 *Barb.* 424; but the courts generally will not entertain a suit to put the grantee in possession, *Southern Ev. Co.* v. *Duffey* (1873) 48 *Ga.* 358; *Kirkpatrick* v. *Clark* (1890) 132 *Ill.* 342; for that would be executing the illegality. *Mediaris* v. *Granberry* (*Tex.* 1905) 84 *S. W.* 1070; *Harrison* v. *Thatcher* (1872) 44 *Ga.* 638. However a conveyance may be had if (1) the grantor asks it in the interest of his creditors, *Carll* v. *Emery* (1808) 148 *Mass.* 32; or if (2) he conveyed under duress, *Anderson's Admr's* v. *Merideth* (1885) 82 *Ky.* 565; *Austin* v. *Winston* (*Va.* 1806) 1 *H.* & *M.* 32, 3 *Am. Dec.* 583; *Bump, Fraudulent Conveyances*, 2*nd ed.* 442, the parties not being in *pari delicto*. *Sanford* v. *Reed* (*Ky.* 1905) 85 *S. W.* 213; 2 *Pomeroy's Equity* 916; see also, *Hinsdill* v. *White* (1861) 34 *Vt.* 558."—5 *Columbia Law Review* 473.

For an elaborate note on the principle of Massi *v.* Lavine, see 3 *American St. Rep.* 727 *et seq.*

"One of the most common occasions for the enforcement of this rule arises in cases where a debtor has conveyed or assigned or in any manner transferred his property for the purpose of defrauding his creditors, and afterwards seek to set aside the transfer as against the grantee or assignee and recover back the property. The door of a court of equity is always shut against such a claimant. *Freeman* v. *Sedwick*, 6 *Gill*, 28, 39, 46 *Am. Dec.* 650; *Stewart* v. *Iglehart*, 7 *Gill & J.* 132, 28 *A. M. Dec.* 202; *Bolt* v. *Rogers* 3 *Paige*, 156; *Stark's Ex'rs* v. *Littlepage*, 4 *Rand.* 372; *Janey* v. *Bird's Adm'rs*, 3 *Leigh*, 570." *Pomeroy, Equity Jurisprudence*, § 401, *n.* 2.

E.—Equity Follows the Law.

TOWNSEND *v.* KILMURREY.

In Chancery, before Lord Chancellor Clarendon.

[*Tothill* 121.]

Fee simple land purchased by the father and descended to the son, this land shall not be assets in law nor equity to pay debts.[1]

WOLLSTENCROFT *v.* LONG.

In Chancery, before Lord Chancellor Clarendon, 1664.[2]

[3 *Reports in Chancery* 12.][3]

Debtor upon Bonds and simple Contract makes a Conveyance of Lands upon Trust, to sell for payment of his Debts, It was declared to be the constant Practice, and so ruled and decreed here, That all the Debts should be paid in proportion: And that if the Lands were not sufficient to pay, all the Creditors should lose in proportion; and so it is where

[1] The law of this case has been since changed by statute. See 3 & 4 *Will.* IV. *c.* 104; *Woerner American Law of Administration* § 574.

"And if the law helps him not conscience cannot help him in this case, for conscience must always be grounded upon some law, and it cannot in this case be grounded upon the law of reason nor upon the law of God, for it is

[2] As a faithful minister of the Crown and as a master-hand in literature, the good Earl stands well in the first rank. As a chancellor his decisions have been treated with scant respect. For example, Lord Kenyon once said: "But it must not be forgotten that that case was determined by Lord Chancellor Clarendon, who after an absence from courts of justice for many years was then recently returned to this country and had not been for some time in the habits of business." [Milbourn *v.* Ewart (1793) 5 T. R. 381, 384.] And Lord Lyndhurst said, in speaking of a case before his noble predecessor: "That, I would remark, is the only case which is open to the observation that was made at the bar of its being a judgment pronounced immediately after the Restoration, and therefore not entitled to much weight. It was decided by Lord Clarendon." [Partridge *v.* Osborne (1828) 5 Russ. 195, 248.]

Lord Clarendon had always two Masters in Chancery to keep him right in matters of practice, and he never made a decree without the assistance of two of the judges. (3 Campbell, Lives of the Lord Chancellors, Ch. LXXIX.)

[3] S. C. Freeman 175; 1 Cases in Ch. 32.

Lands are given to pay Debts and Legacies, they shall be paid in equal proportion, because the Land is made liable to one as well as the other by the Debtor himself; but otherwise it is in Case of Debts on Judgment, that in their own Nature charge the Lands.[1]

not directly bye those laws that a man shall be tenant by the curtesy, but by the custom of the realme. And therefore if that custom help him not, he can nothing have in this case by conscience, for conscience never resisteth the law of man nor addeth nothing to it, but where the law of man is in itself directly against the law of reason or els the law of God, and then properly it cannot be called a law but a corruption, or where the generall groundes of the law of man worketh in a particular case against the sayde laws as it may do, and yet the law good as it appeareth in divers places in our *fyrste epalogue* in latin or els, where there is no law of man provided for him that hath right to a thynge by the law of reason or by the law of God. And then sometime there is a remedy given to execute that in conscience, as by a Sub pena but not in all cases for sometime it shalbe referred to the conscience of the partie, and upon this ground (that is to say) that when there is no title given by the common law, then there is no title by conscience." *St. Germaine, Doctor and Student, f.* 85 (1531).

[1] See cases under the maxim, "*Equality is equity.*"

"We find that it was held in the Court of Chancery, in violation of the law established by legal decisions, that one executor and one joint tenant might in Chancery sue his companion:—that, although from loss or other accident an obligee could not produce his bond, without which by a positive rule of law he could have no remedy, yet he might enforce the obligation in Chancery:—that where the lessor entered on his tenant, and thus, by the rule of law, suspended the rent, he should have relief in equity. So the Court of Chancery in certain cases gave relief against forfeitures, which had been clearly incurred according to the rules of law; the court carrying its jurisdiction to the extent of ordering restitution after judgment at law, and execution; the court in those cases, avoiding to transgress the provisions of the statutes before adverted to, by not examining into the judgment itself, but prohibiting the party from putting it in force; * * * So notwithstanding the maxim before alluded to, where a remedy was provided by the law, which was held by the common law judges to be sufficient, yet the Court of Chancery in some cases gave a more effectual remedy of its own instead. * * *

Thus it appears that a jurisdiction to interfere, in some cases at least, with the rules and maxims of law on the ground of equity and conscience, as well as to supply its defects was clearly exercised."—1 *Spence, Jurisdiction of the Court of Chancery* 409-411.

"This consideration brings to my mind a cause which happened in the Court of Chancery very early in my first attendance of Westminster Hall as a student, which occasioned some mirth as well as attention. The decision is not reported in any book, and my memory does not serve me to state all the circumstances of it. In the law of England there is a process called an *Audita Querela*, which is a suit at common law, whereby a defendant may be relieved after and against a judgment or execution, upon particular equitable circumstances but limited and bound by certain rules. A defendant in a

BUXTON *v.* SNEE.

IN CHANCERY, before LORD CHANCELLOR HARDWICKE, 1748.

[1 *Vesey Senior* 154.]

The demand by the plaintiff was for work done in repairing a ship. 1 Salk. 34. 1 Stra. 695. 1 Atk. 234. Douglas, 97. Cowper, 636.

The defendants were part owners, or their representatives, who received the benefit thereof: and notwithstanding insisted, that they should not make a satisfaction.

LORD CHANCELLOR.

This is undoubtedly a harsh defence. (It has been held, that where a captain contracts, for the use of the ship, credit is given him in respect of his contract: also to the owners as the contract is on their account, and the creditor has a specific lien on the ship; also a captain not personally contracting is not answerable personally for the ship's necessaries. Per Lord *Mansfield,* in *Farmer* and *Davies,* Hill. 26 *Geo.* 3. B. R. reported by Durnford and East. Their having received the benefit is not sufficient to make them liable: for the court will not do so, if the court cannot come at it by way of contract or consequential equity.

The questions on this case are two. First, whether the part-owners by the employment of the plaintiff, either by the master or the husband are become personally liable for the debt created, and contracted for the repairs? The second, supposing they are not, whether the ship itself has contracted a lien by the *Admiralty* law allowed here; and then whether the money arising by the sale is answerable to the plaintiff?

judgment had, by some fraudulent contrivance, artfully brought his case within some of those rules, and sued his *Audita Querela:* against which the plaintiff in the judgment was advised he could make no defence at law, and brought his bill in Chancery to be relieved against the *Audita Querela.* It happened that both my Lord Cowper, then Lord Chancellor, and the Master of the Rolls were called away upon public business, and Mr. Justice Eyre, a strict common lawyer, who had never practiced at all in a Court of Equity, sat in Chancery that day, by virtue of the standing commission to hear causes in the absence of the Chancellor. The counsel for the defendant in Chancery, who was plaintiff in the *Audita Querela,* thought themselves sure of a victory, when so extraordinary a cause as a bill in Chancery, to be relieved against a common law suit of Equity, came to be heard before a comman law judge; and the Counsel for the plaintiff were proportionately in despair. But the Judge found that the plaintiff in Chancery had the merits on his side; and yet the court of common law must, by reason of their general rules established, have given judgment against him, and therefore he decreed an injunction to stay proceedings in the *Audita Querela.* This decree was upon a rehearing affirmed by my Lord Cowper, not without some observation upon the singularity of the case."—*Letter of Lord Hardwicke to Lord Kames,* (1759) *Parkes' History of the Court of Chancery* 501, 507.

I will consider the last question first, and am of opinion that the plaintiff is not intitled to follow the money into the hands of the defendants. Certainly by the *maritime* law, the master has power to hypothecate both ship and cargo for repairs, &c. during the voyage; which arises from his authority as master, and the necessity thereof during the voyage: without which both ship and cargo would perish; therefore both that and the law of this country, admit such a power. But it is different, where the ship is in port, *infra corpus comitatus,* and the contract for repairs, &c. made on land in *England;* then the rule of that law must prevail. I know no case, where the repairs, &c. whether it was by part-owners or sole owner, master or husbands, have been held a charge or lien on the body of the ship. *Watkinson* v. *Barnardiston,* 2 *P. Wms.* 367, being a direct authority to the contrary; and if the river *infra corpus comitatus* should be proceeded against and stopped for such debt, the courts of law would issue a prohibition; the contract being at land, and not arising from necessity. See 1 Salk. 34 acc. If therefore the body of the ship is not liable or hypothecated, how can the money arising by sale be effected or followed; the one being consequential of the other; so that the foundation of an equity's arising for the plaintiff fails. But it is said, that sounds harsh in a court of equity; for even admitting there is no lien on the body of the ship, yet the defendants having received the benefit should make satisfaction; but that follows not as an equitable consequence; for suppose the owner of an house lays out a great sum of money in repairs; upon its descending to his heir at law he cannot be affected with the debt for these repairs, although he receives the benefit; for though that be the law of *Holland,* that it is a lien on the house, it is not so here: for if whoever receives a casual benefit, should be liable to make satisfaction, it would extend to several cases where it ought not. The demand then must rest on the first question: whether the defendants, or those in whose place they stand, are personally liable for the debt; of which I doubt; but will give the plaintiff all the assistance I can; for it is just, that if he can come at it, he ought. Undoubtedly in general, whoever contracts with another, as factor or agent for a third person, it will bind his principal; (And see Cowp. 255. Bull. Ni. Pri. 130.) and there is an election, as in the case of *Blackwell-Hall,* and several other factors, to being an action against either; and there are several cases, where an action may be brought against a principal, though not named at the time of the contract. As among the *Brokers,* who will not be allowed as witnesses to prove the contract, and that it was made for the principal, though they were not named. It is no answer therefore to say, that the part owners are not named.

Then how far the act of the master, can create an *Assumpsit* betweeen the plaintiff and the part-owners. Had it been in the course of the voyage, it would have been another consideration; but here it seems the master did not act as agent for the part-owners, but the husband's.

It is true that is in the answer under the words *heard and believe;* but not being replied to, it must be taken as evidence, because no opportunity is given to prove it.

Then the question, which is very material, and in respect of which I am not sufficiently informed of the course of trade, is upon the husband: whether the part-owners are bound by the contract with the husband; he being general agent? Supposing the principle upon which the plaintiff goes, is true, the contract with the husband is joint, and will survive.

The most beneficial thing then, that can be done for him, is, to direct, that he be at liberty to bring an action against the survivors: to restrain the defendants from pleading the statute of limitations, or from insisting upon any discharge under a commission of bankruptcy against one of them.

But let the bill be dismissed, so far as it seeks any relief against the body of the ship, or the money arising by the sale thereof.[1]

WATTS *v.* BALL.

IN CHANCERY, BEFORE LORD CHANCELLOR COWPER, 1708.

[1 *Pere Williams* 108.]

The case in effect was: one seised of lands in fee had two daughters, and devised his lands to trustees in fee, in trust to pay his debts, and to convey the surplus to his daughters equally.

The younger daughter married and died, leaving an infant son and her husband surviving.

The eldest daughter brought a bill for a partition; and the only question was, whether the husband of the younger daughter should have an estate for life conveyed to him, as tenant by the curtesy?

The husband in his answer had sworn, that he married the younger daughter, upon a presumption that she was seised in fee of a legal estate in the moiety; that at the time of the marriage she was in the actual receipt of the profits of such moiety; and it was admitted, that this trust was not discovered, until after the death of the younger daughter, nor until it was agreed, that a partition should be made.

[1] "Work done for a ship in England is supposed to be on the personal credit of the employer."—*Per Lord Mansfield* in *Wilkins v. Carmichael* (1779) *Douglas* 97, 101.

See notes to this case in Belt's Supplement to Vesey Senior.

As to liability in assumpsit for necessaries supplied to the ship, see *Rich* v. *Coe* (1777) 2 *Cowper* 636.

Decreed by Lord Chancellor, that trust estates were to be governed by the same rules, and were within the same reason, as legal estates;[1] and as the husband should have been tenant by the curtesy, had it been a legal estate, so should he be of this trust-estate; and if there were not the same rules of property in all courts, all things would be, as it were, *at sea,* and under the greatest incertainty.

His lordship added, that this being a case of some difficulty, he could have wished it had not come before him as a cause by consent; but his opinion was, that the husband ought to be tenant by the curtesy; and the rather because it appeared that he, upon his marriage, did conceive and presume his wife to be seised of a legal estate in the moiety, and had reason to think so, she being in possession thereof.

Wherefore it was decreed, that an estate for life in a moiety in severalty, should be conveyed by the trustees to the husband, with remainder in fee to his son.

In this cause Mr. *How,* (who was for the husband) cited the case of *Sweetapple* versus *Bindon,* where money was devised to be laid out, for the benefit of a feme sole, in the purchase of lands in fee; the feme married and had issue, and died, the husband surviving; and decreed in equity, that tho' the money was not invested in a purchase during the life of the wife, yet in regard, in this case, if it had been so laid out, the husband would have been tenant by the curtesy, and that this was as land in equity, therefore the husband was equally intitled.

And Mr. *Vernon* told me, that tho' in the case of Lady *Radnor* and *Vandebendy* it was decreed in equity, and affirmed in the house of lords, that a feme dowress should not have the benefit of a trust term, where the husband died seised of the legal estate of the freehold, yet that the contrary, on consideration, was decreed by Sir *John Trevor,* Master of the Rolls, in the case of *Dudley* versus *Dudley.*

HEARD *v.* STANFORD.

In Chancery, before Lord Chancellor Talbot, 1735.[2]

[*Forrester* 173.][3]

The Defendant's Wife, before Marriage, gave a Promissory Note for 50 *l.* to the Plaintiff, in Consideration of five Years Service, at the Rate of 10 *l. per Annum,* and afterwards married the Defendant, who had a Fortune with her to the Amount of 700 *l.* Part whereof consisted of

[1] See the opinion of Lord Mansfield, C. J., in Burgess *v.* Wheate, *supra* 56.

[2] There is but one view of the ability and character of this great and good man. Of the many tributes to him as a chancellor three may be quoted:

[3] S. C. 3 Peere Williams 409.

Things in Action, some of which the Defendant received as Husband, and the rest he took as Administrator to his late Wife. The Bill was for the Payment of this Note, upon Suggestion of his having received a great Fortune with her, and never having made any Settlement upon her. The Defendant insisted, That that Part of his Wife's Fortune which was not reduced into Possession by him during the Coverture, and which he received after her Death as Administrator, was not near sufficient to pay her Debts; and that he had already paid more than that Part amounted to.

The Question was, Whether the Husband should be liable in Equity to the Payment of his deceased Wife's Debts; and the Fortune he had received with her should be looked upon as equitable Assets? it being clear, that at Law he is chargeable only during the Coverture, and no longer.

For the Plaintiff was cited the Case of *Freeman* versus *Goodham*, 1 *Chan. Ca.* 295, where, upon a Bill brought against the Husband for Discovery of Goods bought by the Wife before Marriage, which after her Death came to his Hands, the Lord *Nottingham* said, he would change the Law in that Point. And also that of *Powell* versus *Bell, Abr. Eq. Ca.* 60. *pl.* 7.

Lord Chancellor. The Question is, Whether the Husband, as such, be chargeable for a Debt of his Wife's after her Death in a Court of Equity? As on the one hand the Husband is by Law liable to all his Wife's Debts during the Coverture, although he did not get one Shilling Portion with her, and that her Debts should amount to 2000 *l.* or any other Sum whatever; so on the other hand it is as certain, that if the

Sir Lord Kenyon, M. R., considered him to be a man of "Consummate knowledge" [Milbourne *v.* Milbourne (1786) 1 Cox 247, 248]; Chief Justice Willes termed him a very great chancellor [Crispe *v.* Perritt (1744) Willes 467, 472]; while Sir John Bayley rightly declared him to be "one of the greatest real property lawyers that ever filled the office of Lord Chancellor" [Doe dem. Lloyd *v.* Passingham (1827) 6 Born & Cr. 305, 315].

"No man ever occupied the high position he had attained with more unmixed admiration: nor did the death of any great judicial dignitary ever cause so much general lamentation. Living too short a time to excite the jealousy of his colleagues in the ministry, or to become obnoxious to the opposition, he presided long enough in his court to prove himself a most efficient and impartial judge. His patience in listening to arguments, his discriminations in sifting facts, his readiness in applying precedents, and the reasons upon which he founded his judgments, made his decrees acceptable to the legal community, and prevented murmurs even among the unsuccessful litigants. The purity of his life, his unblemished integrity, his humanity to the distressed, his liberality to all, his gentleness of manners, his urbanity, cheerfulness, and wit, gained him so many friends, and were so universally recognized, that he not only escaped the vituperation of political writers during his life, but both parties after his death vied with each other, both in prose and verse, in unqualified encomiums on his character."—Foss, Lives of the Judges.

Debt be not recovered during the Coverture, the Husband is no longer chargeable as such, let the Fortune he received with his Wife be never so great. The Case perhaps may be hard, but the Law hath made it so, that it may be equal on both sides, as well where the Husband is sued during the Coverture, for a Debt of his Wife's, with whom he had no Fortune, as where he by her Death is discharged from all her Debts, notwithstanding any Fortune he may have received in Marriage with her; so is the Law, and the Alteration of it is the proper Work of the Legislature only. There are Instances indeed in which a Court of Equity gives Remedy where the Law gives none; but where a particular Remedy is given by Law, and that Remedy bounded and circumscribed by particular Rules, it would be very improper for this Court to take it up where the Law leaves it, and extend it farther than the Law allows. Besides, if Relief was to be given in this Case, it would be very unreasonable not to extend it to the former Case, where the Hardship lies on the Husband, which was never yet done. There is a Case which may, and probably does happen very often, that comes very near to this. Suppose Goods are sold for a certain Price to a Person, who just after the Delivery, and before the Price paid, becomes a Bankrupt, and these very Goods are vested in the Assignees; the Vendor can come in but as a Creditor for his Share; and can neither pretend to have the Price agreed, nor pursue the Goods in the Hands of the Assignees; and yet this is a Hardship upon him, but not such as is relievable here. In the Case of *Freeman* versus *Goodham,* the Goods never came to the Husband's Hands until after the Wife's Death; which made it a very hard Case upon the Creditor, and probably occasioned the Saying of my Lord *Nottingham:* But even there he only overruled a Demurrer, put into a Bill for a Discovery of the Goods; and it does not appear what became afterwards of the Cause. And in that of *Powell* versus *Bell* the Wife was Administratrix of her first Husband, and it did not appear what she had in her own Right, and what as Administratrix of her Husband; in which Case the Marriage is no Gift in Law of the Goods which she hath in *Auter Droit:* And upon this Reason only are founded all the Cases where a surviving Husband has been charged with his Wife's Debts after her Death.

And so decreed an Account of what the Husband had received since his Wife's Death as her Administrator; and that he should be liable for so much only: But as to any further Demand against her dismissed the Bill.[1]

[1] See note 3 to Rees *v.* City of Watertown.

Pomeroy, commenting on this passage, says, "It should be observed, however, that equity had not, in developing its jurisdiction, invaded the particular doctrine of the common law which was involved in this case; but it had certainly disregarded other rules as positive and well settled, in its previous course of decision." *Equity Jurisprudence* § 425.

"Thus in the first place it was said, that it is the business of a court of

COWPER *v.* EARL OF COWPER (1754) 2 *Peere Williams* 720, 753.[1]—SIR JOSEPH JEKYLL, M. R.—The Law is clear, and Courts of Equity ought to follow it in their judgments concerning titles to equitable estates: otherwise great uncertainty and confusion would ensue; and though proceedings in Equity are said to be *secundum discretionem boni viri,* yet when it is asked, *vir bonus est quis?* the answer is *qui consultia patrum qui*

equity to abate the rigour of the common law [*Lord Kames, Principles of Equity Tom.* 1, *p.* 41 *et seq.*] But no such power is contended for. Hard was the case of bond-creditors, whose debtor devised away his real estate: rigorous and unjust was the rule which put the devisee in a better condition than the heir; yet a court of equity had no power to interpose. Hard is the common law still subsisting, that land devised, or descending to the heir shall not be liable to simple contract debts of the ancestor or devisor, although the money was laid out in purchasing the very land; and that the father shall never immediately succeed as heir to the real estate of the son; but a court of equity can give no relief; though in both these instances the artificial reason of the law, arising from feudal principles, has long ago entirely ceased. * * * In all such cases of positive law, the courts of equity as well as the courts of law, must say with Ulpian, "*hoc quidem perquam durum est, sed ita lex scripta est.*"—3 *Black Com.* 430.

[1] "In this case," says Pomeroy, "the court reluctantly adhered to the legal canon of descent which prefers the whole to the half blood, and held that an equitable estate in fee descended to a cousin of the whole blood, instead of to a brother of the half blood of the deceased owner."—*Equity Jurisprudence* § 428, *n.* 3.

"*Equitas sequitur legem.* When the court finds the rules of law right, it will follow them, but then it will likewise go beyond. One case of that kind occurred to me during the argument. The statutes of forcible entry, only provide for removing the force; but what says this Court, even where a man has not a legal but only an equitable estate, or be it one or the other, we will here, not only remove the force, but grant him an injunction, to quiet the possession of such an estate as he had then, and three years before."—*Per* Lord Chancellor Hardwicke in Paget *v.* Gee (1753) Amb. (Blunt's edition) 807, 810.

"It may be said, that *boni est judicis ampliare legem.* But this maxim is not to be understood as that a Judge in equity should alter the maxims of the common law, for this would be to assume a power paramount to the law. The utmost that can be meant by this maxim, if it has any meaning in it, is, that this court, provided it has the law to justify it, should sometimes usurp upon the jurisdiction of the courts at law. If this court should extend its jurisdiction in this point, it might by a parity of reason extend it in other points, *viz.* determine how often distresses should be taken. A collateral warranty was certainly one of the hardest and most cruel points of the common law, because there was not so much as an intended recompence, yet I do not find that this Court ever gave relief in it."—*Per Lord Chancellor Cowper, Earl of Bath* v. *Sherwin* (1710) 10 *Mod.* 1, 3.

"And undoubtedly the warranty is collateral to the title of *John*, who claims by purchase, and not from the person who made the warranty; and as this was before the Stat. 4 & 5 2. Anne, cap. 16 (how hard and unreasonable so-

leges juraque servat; and as it is said in *Rook's* Case, 5 *Rep.* 99 *b.* that discretion is a science, not to act arbitrarily according to men's wills and private affections; so the discretion which is executed here, is to be governed by the rules of Law and Equity, which are not to oppose, but each in its turn, to be subservient to the other; this discretion in some cases, follows the law implicitly, in others, assists it and advances

ever it may be) there is no room for a court of equity, which cannot alter the law, to interpose." Per Lord Chancellor TALBOT in Savage *v.* Taylor (1736) Cases temp. Talbot 234, 237.

"In approaching these questions there may be propounded as postulates or legal truisms, admitting of no dispute, the following propositions: 1. That wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable."—Per Mr. Justice DANIEL in Magniac *v.* Thompson (1853) 15 How. 281, 299.

"As to the question, whether a license, given to open a shop, is to have a different operation here and at law, it has been long settled at law (Dumpor's case, 4 Rep. 119), that, a covenant not to assign without license, being once dispensed with, the condition is gone; and equity has followed that. (Brummell *v.* McPherson, 14 *Ves.* 173.) I should not have thought that a very good decision originally; and, I think, here we ought to hesitate to say, that, if the license is to be in writing, a mere act, not establishing whether the party meant a license, general or particular, should be taken to be a general license; admitting, therefore, the application of the doctrine of law in the case to which I allude. (12 *Ves.* 191; Brummell *v.* McPherson, *supra.*) If, however, the covenant is not to convert the premises into a shop, or to carry on a trade, without a license in writing, I cannot conceive that the permission of the lessor, without writing, to carry on one trade, amounts to a general license for any trade; as the good sense is, and, if it is new, the law ought to be, that you must infer from his conduct, that the lessor would have given in writing that sort of license, which it would have been prudent to give; and it cannot be represented, that a license to open a shop for a particular trade raises the inference, that commencing with that trade, the lessee may afterwards carry on any other.

"In this case, therefore, I cannot from the permission to carry on a particular trade in this shop conceive that the tenant may carry on any other; and a Court of Equity ought not to enter into a comparison; and permit him to carry on some trades, as less offensive than others."—Per Lord Chancellor ELDON in Macher *v.* Foundling Hospital (1813) 1 Ves. & B. 188, 190-1.

"It is a well settled rule, that 20 years' possession by the mortgagee, without account or acknowledgment of any subsisting mortgage, is a bar to a redemption, unless the mortgagor can bring himself within the proviso in the statute of limitations. . . . The analogy between the right to redeem in this court, and the right of entry at law, is presumed complete and entire throughout, so that the mortgagor who comes to redeem, after the 20 years, must show himself within one of the exceptions that would save his entry or ejectment at law; and he must, likewise, show that he had filed his bill within 10 years after his disability ceased. The cases which I have looked into and to

the remedy; in others again, it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with.

HEDGES *v.* DIXON COUNTY (1893) 150 *U. S.* 182, 192.—MR. JUSTICE JACKSON. * * * The principle running through these decisions controls the case under consideration, and clearly establishes that the complainants are not entitled to the relief they seek. The fact that the complainants have no remedy at law, arising from the invalidity of the bonds, confers no jurisdiction upon a court of equity to afford them relief. The established rule, although not of universal application, is that equity follows the law, or, as stated in *Magniac* v. *Thompson*, 15 *How.* 281, 299, "that wherever the rights or the situation of the parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation but in all such instances the maxim *equitas sequitur legem* is strictly applicable."

Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake to so modify it as to make it legal and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of

which I now refer, are uniform in support of this just and necessary rule; and the construction of the statute is the same here as at law. The same limitations are adopted, with the allowance of the same time for disabilities. (Jenner *v.* Tracy, note to 3 P. Wm. 287; Bell *v.* Harvey, *ib.*, and in *app.* No. 12 to Sugden's Law of Vendors, 3rd edit. Lord Kenyon, in Bonny *v.* Ridgard, cited in 17 Vesey, 99. Lord Camden, in 3 Bro. 639, note Anon 3 Atk. 313. Aggar *v.* Pickerell, 3 Atk. 225. Lord Rosslyn, in Lytton *v.* Lytton, 4 Bro. 458. Hodle *v.* Haley, 1 Vesey & B. 536. Reeks *v.* Postlethwaite, Cooper's Eq. Rep. 161. Bairon *v.* Martin, *id.* 189. Moor *v.* Cable, 1 Johns Ch. Rep. 385)." —Per Kent, Chancellor, in Demarest *v.* Wynkoop (1817) 3 Johns Ch. 129, 135.

"This power of distress implies the relation of landlord and tenant, and therefore rent was meant in the strict sense of the term; in the event mentioned in this covenant, the single was to be turned into a double rent. If the party thought that this was the case of a penalty, why did he not try the question at law? It is altogether a mistake to suppose there is one rule at law and another in equity. I am bound to give this lease the same construction which it would receive in a court of law. If the party thought this a penalty he should not have discontinued his action at law, and come into this court for a peculiar construction of this covenant."—Per Lord Chancellor Sugden, in Gerrard *v.* O'Reilly (1843) 3 Dr. & W. 414, 430.

law, and where the transaction, or the contract, is declared void because not in compliance with express statutory or constitutional provisions, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof.[1]

HOVENDEN *v.* ANNESLEY.

In the High Court of Chancery, Ireland, before Lord Chancellor Redesdale, 1806.

[2 *Schoales and Lefroy*, *607.]

See the case as printed on p. 373, *infra*.

ANONYMOUS.

1470-71.

[*Year Book*, 9 *Edward IV*, *placitum* 25.]

In debt upon a borrowing, the defendant said that a communication was had between them [the plaintiff and the defendant] at the time of the borrowing, that the defendant should enfeoff the plaintiff of certain land to him and his heirs, and to take the profits until the defendant paid him that sum; and he [the defendant] said that he enfeoffed him [the plaintiff], ut supra, etc., by force of which he was seised, etc.; and this day is seised, and has taken the profits, and if the plaintiff will [re-]enfeoff him, he is, and all time has been ready to pay him, etc.: judgment, etc. And sic, although he has not remedy in our law, he may have subpœna if he pays the money, etc. . . .[2]

[1] *Cf. McCormick* v. *Grogan* (1869) *L. R.* 4 *H. L.* 82, 97, supra.

"If one has no writing [specialty] and his debtor dies, there is no remedy by the common law, and yet in equity the creditor shall have remedy.—Year Book, 7 Hen. 7, 12.

"If a man is indebted without specialty and dies, his executor shall not be charged by the common law, but in the Chancery by conscience.—7 Hen. 7; Brooke's Abridgment, Conscience, etc., 8."—1 C. P. Cooper's Reports 555.

"If one pays the duty of a bond, and has no writing [specialty] to show it, that is good in equity, and yet it is no bar at common law.—Year Book, 7 Hen. 7, 12."—id. 558.

[2] Printed as translated in 1 C. P. Cooper's Reports 535.

F.—Equity Looks to the Intent Rather than the Form.

PICKERING *v.* KEELING & PICKERING.

In Chancery, before Lord Keeper Littleton, 1641.

[1 *Reports in Chancery,* 147.]

That Thomas Pickering, deceased, Father of the Defendant *Tho. Pickering* and the Defendant *Thomas Pickering* by Deed 16 *Jac.* settled Lands to several Uses charged with an Annuity or Rent Charge of 20 *l. per annum* to be paid to the Plaintiff; but the Defendant having gotten seized of the said Lands, and got the said Deed into their Hands refuse to pay the said Annuity.

The Defendants insist that the said Deed is void in Law by reason of a former Deed made 12 *Jac.* for valuable Considerations whereby the said Lands were conveyed in Fee without any Rent Charge.

This Court upon reading the said Deed, the Plaintiff not proving that the said Annuity was granted upon any valuable Consideration, whereby this Court might be induced to set up and make good the said Deed in Equity, This Court saw no Cause to relieve the Plaintiff herein, but dismist the Bill.

BEARD *v.* NUTTHALL.

In Chancery, before Sir John Trevor, M. R., 1686.

[1 *Vernon* 427.]

The plaintiff's husband after marriage enters in a voluntary bond to settle a jointure of the value of —— on his wife, and afterwards settles lands of that value upon his wife in jointure, and thereupon the bond was delivered up to be cancelled. The husband dies, and the jointress is evicted. The bill was that the wife being administratrix of her husband might retain of her husband's personal estate against the defendants, who claimed a share of the personal estate upon the statute of distributions, to the value of her jointure; there being no creditors in the case.

The court ordered that in regard the plaintiff was now become entitled to dower, that she should proceed at law for recovery thereof, and what the same should fall short in value of the jointure, should be retained

by her out of the personal estate, notwithstanding the bond was after marriage and voluntary, and delivered up to be cancelled: for an agreement, though voluntary, under hand and seal, ought to be decreed by this court: and the delivery up of the bond by a feme covert could no way bind her interest.

BOLD *v.* CORBETT.

IN CHANCERY, BEFORE LORD CHANCELLOR SOMERS, 1698.

[*Precedents in Chancery* 84.]

The Lord Chancellor said, in this case voluntary conveyances might be aided in a court of equity; but where there is no remedy at law, it is discretionary in this court to interfere or not.

BUNN *v.* WINTHROP (1815) 1 *Johns. Ch.* 329, 336.—THE CHANCELLOR [KENT]. * * * Nor do I think that the want of some good or valuable consideration appearing on the face of the deed ought to preclude this court from lending its assistance. There is no rule of the court against giving effect, as between the parties, to a voluntary actual transfer by deed, of a personal or chattel interest, without any consideration appearing. The rule, I apprehend, is directly otherwise, as to personal property, whatever it may be as to real estate. It was said by the Chancellor, in *Bold* v. *Corbett,* (*Prec. in Ch.* 34,) to be discretionary in a court of equity, whether it would aid a voluntary conveyance where there was no remedy at law; and by looking into the earlier cases it would seem that there was much floating and unsettled opinion on the question how far equity would help a defect in a voluntary conveyance of real property, or decree specific performance in the case of a voluntary covenant. (1 *Ch. Rep.* 34. *Wiseman* v. *Roper,* 2 *P. Wms.* 467, 8. *Randal* v. *Randal,* 2 *Vent.* 365. n. 1 *Vern.* 100, *Villers* v. *Beaumont.*) With respect, however, to chattel interests, an agreement under seal imports a consideration at law. In *Beard* v. *Nutthall,* (1 *Vern.* 427,) a bond, though voluntary and without consideration, was supported by a decree; and the Master of the Rolls, in 3 *P. Wms.* 222, spoke to the same effect as to a voluntary bond. But it will be sufficient, on the subject of aiding voluntary agreements, to recur to the distinction declared by Lord *Eldon,* in *Ellison* v. *Ellison,* (6 *Ves.* 662,) as being one which reduces this point to something like established rule. If you want, according to that distinction, the assistance of chancery to raise an in-

terest by way of trust, on a covenant, or executory agreement, you must have a valuable or meritorious consideration; for the court will not constitute you *cestuy que trust,* when you are a mere volunteer, and the claim rests in covenant, as a covenant to transfer stock. But if the actual transfer be made, the equitable interest will be enforced; for the transfer constitutes the relation between trustee and *cestuy que trust,* though voluntary and without consideration. To the same effect was the observation of Sir *Joseph Jekyll,* in *Lechmere* v. *Earl of Carlisle,* (3 *P. Wms.* 222,) that every *cestuy que trust,* though a volunteer, and the limitation without consideration, was entitled to the aid of a court of equity.

The deed in question, in this case, was an actual creation of the trust and transfer of the specified interest; and no doubt can arise under the above distinction, even independent of the operation of the instrument as a deed, that this court ought to give it effect and performance.

If it was necessary to go further on this point, I should be induced to say that the facts appearing in the bill and answer amount to proof of a consideration. One of the plaintiffs is an infant and natural child of the grantor; and the other is the mother of the child, who had resided in the house of the grantor, having the charge of his family for as much as fifteen years prior to the date of the instrument, and while the grantor was, during that time, passing from the age of 55 to that of 70 years. It appears to me that, under these circumstances, the grantor, a man of very large fortune, was bound, in reason and justice, to make competent provision for the mother and the child. *Past* seduction has been held a valid consideration to support a covenant for pecuniary reparation; and the innocent offspring of criminal indulgence has a claim to protection and support, which courts of equity cannot, and do not, disregard. It may be truly said, *Non obtusa adeo gestamus pectora.* In the cases of the *Marchioness of Annandale* v. *Harris,* (2 *P. Wms.* 432. 3 *Bro. P. C.* 445,) of *Cray* v. *Rooke,* (*Cases temp. Talbot,* 153,) and of *Cary* v. *Stafford,* (*Amb.* 520,) settlements by way of voluntary bond, covenant, or deed, as the *præmium pudicitiæ,* were established, and a specific performance decreed.

MINTURN *v.* SEYMOUR (1820) 4 *Johns. Ch.* 497, 500.—THE CHANCELLOR [KENT]. * * * The case is reduced to this simple point, whether equity will enforce a mere voluntary agreement, not valid in law, and especially in destruction of a legal claim, and recovery for a just debt. A voluntary deed may be aided in special cases, as was mentioned in *Bunn* v. *Winthrop,* (1 *Johns. Ch. Rep.* 329.) but it is a clear, general rule, that a bill does not lie to enforce a mere voluntary agreement. The language of the books, from the earliest to the latest cases, is uniform in support of the doctrine, that a voluntary defective conveyance,

which cannot operate at law, is not helped in equity, in favour of a volunteer, where there is no consideration, nor any accident or fraud in the case. To entitle the party to the aid of this Court, the instrument must be supported by a valuable consideration, or, at least, by what a Court of equity considers a meritorious consideration, as payment of debts, or making provision for a wife or child. (*Pickering* v. *Keeling*, 1 *Rep. in Ch.* 78. *Thompson* v. *Attfield*, 1 *Vern.* 40. *Longdale* v. *Longdale*, 1 *Vern.* 456. *Colman* v. *Sarel*, 3 *Bro.* 12. 1 *Ves. Jun.* 50. and see also, 1 *Fonb.* 339. s. 2. and 1 *Maddock's Ch. Rep.* 564.) [1]

JEFFERYS *v.* JEFFERYS.

In Chancery, before Lord Chancellor Cottenham, 1841.[2]

[*Craig & Phillips* 139.]

John Jefferys executed certain indentures of lease and release by which, in consideration of the natural love and affection he had for them, he conveyed to his three daughters certain freeholds, and covenanted to surrender certain copyhold estates in trust for their benefit. He after-

[1] Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unincumbered for the payment of the grantor's debts; then such conveyance will be valid against conveyances existing at the time. But though there be no fraudulent intent, yet if the grantor was considerably indebted and embarrassed at the time, and on the eve of bankruptcy; or if the value of the gift be unreasonable, considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts; then such conveyance will be void as to creditors."—*Per Swift, Ch. J.*, in Salmon *v.* Benett (1816) 1 *Conn.* 525, 547; *s. c.* with notes in 1 *Hare and Wallace American Leading Cases* 32.

[2] "Cottenham was a steady and consistent Whig, a sound lawyer, and an exceedingly able judge. His judgments, which were more remarkable for their sound sense than for any subtle reasoning, were clear, businesslike, and free from affectation or display. Brougham declared that his appointment of Pepys to the mastership of the rolls was his 'own best title to the gratitude of the profession' (Life and Times of Lord Brougham, 1871, III., 442). 'His skill in deciding cases,' says Campbell, 'arises from a very vigorous understanding, unwearied industry in professional plodding, and a complete mastery over all the existing practice, and all the existing doctrines of the Court of Chancery. He considers the system which he has to administer as the perfec-

wards devised part of these same estates to his widow, who, after his death was admitted to some of the copyholds. The daughters now seek to have the trusts of the settlement carried into effect, and to compel the widow to surrender the copyholds to which she had been admitted.[1]

THE LORD CHANCELLOR [COTTENHAM]. The title of the Plaintiffs to the freehold is complete; and they may have a decree for carrying the settlement into effect so far as the freeholds are concerned. With respect to the copyholds, I have no doubt that the Court will not execute a voluntary contract; and my impression is that the principle of the Court to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement. As, however, the decision in *Ellis* v. *Nimmo* is entitled to the highest consideration, I will not dispose of this case absolutely, without looking at a former case (*Dillon* v. *Coppin,* mentioned *supra*), in which I had occasion to refer to that decision. Unless I alter the opinion I have expressed, the bill must be dismissed, with costs, so far as the copyholds are concerned.

Feb. 1. On this day his Lordship said he had looked at the case alluded to, and that he saw no reason for altering the opinion he had before expressed.[2]

CLENCH *v.* WITHERLY.

IN CHANCERY, BEFORE LORD CHANCELLOR NOTTINGHAM, 1678.

[*Reports Temp. Finch* 376.]

Sir Miles Hobert being seised of several *Copyhold* Lands, held of the Manor of *Blofeild Thorp* near *Norwich* and *Upton,* did about December 1661, in Consideration of 100 *l.* which he borrowed of *Edmund Witherly,* late the Husband of the Defendant *Dorothy,* and for securing the Repayment thereof, surrendered the said *Copyholds* to the said *Edmund Witherly* and his Heirs without any manner of Condition therein expressed; and as a farther Security, he gave the said *Witherly* a Judgment for 200 *l.*

But by a Note in Writing, under the Hands of the said *Sir Miles Hobert* and *Edmund Witherly,* dated in *November* before, it was agreed, that if *Sir Miles should in January* 1662, pay unto the said *Edmund*

tion of human wisdom. Phlegmatic in everything else, here he shows a considerable degree of enthusiasm' (Life of Lord Chancellor Campbell, II., 207). He was neither an eloquent orator nor a great advocate." (Dictionary of Nat. Biography, article, Pepys, C. C.)

[1] This is an abridged statement of the facts.

[2] "I shall now state, by way of illustration, some of the most important instances in which the principle [equity looks at the intent rather than to

106 *l.* and all such Money as he should disburse for *Fines* for his Admittance and otherwise, &c. then the said *Edmund* should surrender back the said Copyhold to him and his Heirs, and then also acknowledge Satisfaction on the said Judgment for 200 *l.*

form] has been applied, and the settled doctrines of equity jurisprudence which are its immediate results. The first, and by far the most important consequence of the principle, reaching through a large part of the equity jurisprudence, is found in every species of equitable property, estate, or interest, and of equitable lien, so far as these exist by the doctrines of equity, but not by those of the law. While, as is shown by the last section, all these purely equitable property interests and liens arise from the direct operation of the grand principle, equity treats that as done which in good conscience ought to be done, still this maxim could only produce such effects in consequence of the other principle, that equity looks at the intent rather than at the form. In every kind of equitable property, or interest analogous to property, the external acts or events peremptorily required by the law in order to the existence of any property are wholly wanting; so that if the external form of the transaction had been regarded, no property, nor right resembling property, could possibly exist. It is by disregarding these forms and looking at the real relations involved in the act of the parties, at the real substance and intent of the transaction, the court of chancery has built up its magnificent structure of equitable property, estates, and proprietary interests. The same is true of a large part of equitable liens. The external form is either an assignment, which at law is wholly nugatory, or an executory agreement, which at law only creates a mere personal right of action,—at most a claim for damages; but equity, going below this mere appearance, and seeing the real intent, gives effect thereto by treating the assignment or agreement as creating a definite lien upon specific lands, or chattels, or securities, or other kind of fund, as the case may be." The same author enumerates penalties and forfeitures, the redemption of mortgages, and "the doctrine which generally treats as joint and several the rights and liabilities arising from contracts which are regarded by the law as strictly joint," as being derived from and controlled by this maxim.—*Pomeroy* 1 *Equity Jurisprudence* § 380.

The maxim is stated by Francis, "Equity regards not the circumstance but the subject of the act." He has collected the early cases under this heading.—*Maxims* 53.[1]

[1] "It [this maxim] is the parent of the equitable doctrine of *merger*, of the doctrine of *penalties* and *forfeitures*, of the *equity of redemption*, and of the doctrines relaxing the rigor and effect of the *seal*, in cases of accident, mistake, or fraud. It is also of controlling efficacy in the doctrine of trusts, of specific performance, of conversion, of subrogation, of assignment, and a variety of others. It is by force of this maxim that the rule holds good which forbids that being done indirectly which cannot be done directly. Rules of interpretation for discovering the *intent* of statutes, wills, and contracts, tacitly refer to this maxim as their basis.

"One of the most salutary applications of this maxim is in relaxing the technicality of equity pleading; and it has been the root of important legislative law reforms."—Phelps, Juridical Equity § 87.

Edmund Witherly was admitted accordingly, and afterwards he surrendered the Premisses to the Use of his Will, and thereby devised Part thereof to *Dorothy* his Wife, and left the other Part to descend to his Son *Thomas Witherly* the Infant.

Since which Time, several Estates have been carved out of the Premisses by the said *Dorothy,* after the Death of her Husband *Edmund Witherly,* to several Persons, and she and her Son *Thomas* pretend they have an absolute Estate therein.

But it appearing to the Court, that the said Surrender and Judgment were only Securities for the Repayment of the said 100 *l.* lent by the aforesaid *Edm. Witherly,* the Plaintiffs have entitled themselves to a Redemption; and the same was decreed accordingly, and that the Defendants account, &c.

SIR SIMEON STEWART'S CASE.

In Chancery,————

[2 *Schoales* & *Lefroy* 381.][1]

The late Sir Simeon Stewart being embarrassed in his affairs, made a conveyance to the late Lord Delaware, Sir H. Tichborne, and others, in trust, for the payment of his debts. Previous to executing that conveyance, a gentleman of the name of Willis had been prevailed on by Sir Simeon Stewart to lend him a large sum of money; and Sir Simeon wrote him a letter, in which he stated that he would make a mortgage to him on some part of his Hampshire estate; and the question was, whether that was a contract which bound the trustees, who were trustees for general creditors. The creditors insisted they were purchasers for valuable consideration, without notice of this contract. The fact of notice could not be brought home to the creditors; but it was sufficiently established that the persons who prepared the trust deeds, and were therefore the agents of the creditors and the trustees in that transaction, had full notice; and therefore the only question was, whether this bound the estate in the hands of trustees, as being an equity affecting Sir Simeon Stewart, prior to his conveyance; for if it bound him the consequence would be that it bound his trustees, under

[1] The case as printed is merely Lord Chancellor Redesdale's statement of it in his opinion in *Card* v. *Jaffray* (1805) 2 *Sch.* & *Lef.* 374, 381. He prefaced his statement by the remark "The case of Sir Simeon Stewart, which has been mentioned, I remember the more particularly because it was a family I was well acquainted with, and my brother was one of the trustees."

the circumstances of that deed. The court did determine that the letter was sufficient to bind him.

WAYT *v.* CARWITHEN. (1883) 21 *W. Va.* 516, 520.—SNYDER, J.—* * * A mortgage, or trust deed, which cannot be enforced by a sale under the power or by a judgment of foreclosure, on account of some informality requisite to a complete instrument, will nevertheless be regarded as an equitable mortgage, and the lien will be enforced by proceedings in equity. The attempt to create a security in legal form upon specific property having failed, effect is given to the intention of the parties, and the lien enforced as an equitable mortgage. Any agreement between the parties in interest that shows an intention to create a lien may be in equity a mortgage. *Daggett* v. *Rankin,* 31 Cal. 321. As stated by Judge Story, "If a transaction resolves itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." *Flagg* v. *Mann,* 2 Sum. 486, 533. Effect has been given upon this principle to an instrument given by the maker of two notes to his sureties, the notes reciting that they were for the purchase of land and providing that in case the maker should fail to pay them, binding him to convey the said land to his said sureties. This was held, upon the failure of the maker to pay the notes, to be a mortgage in favor of the sureties. *Courtney* v. *Scott,* Litt. Sel. Cas. 457; *Lyon* v. *Lyon,* 67 N. Y. 250. So an agreement on the back of a note, making it a charge upon particular land, is an equitable mortgage. In this way an agreement intended to operate as a revival of a mortgage note, which had been paid, may be rendered effectual as an equitable mortgage, although ineffectual to revive the mortgage lien. *Peckham* v. *Haddock,* 36 Ill. 38. And so an agreement in a lease, that the lessor "is to have a lien" upon certain property for the faithful performance of the lessee's obligation to pay rent, is in effect a mortgage. *Whiting* v. *Eichelberger,* 16 Iowa 422. See 1 Jones on Mortg. §§ 162 to 171.

From these authorities I conclude that any deed or written contract used by the parties for the purpose of pledging real property, or some interest therein, as security for a debt or obligation, which is informal and insufficient as a common law mortgage, but which by its terms shows that the parties intended that it should operate as a lien or charge upon specific property, will constitute an equitable mortgage and may be enforced in a court of equity.

ATKINSON *v.* MILLER.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, 1890.

[34 *West Virginia* 115.][1]

BRANNON, JUDGE:

This suit in equity was brought in the Circuit Court of Jefferson county by George W. and Fannie B. Atkinson for themselves and all other lien-creditors of Robert M. Miller against said Miller, to enforce the liens of a judgment in favor of George W. Atkinson and a judgment in favor of Fannie B. Atkinson against Miller, both rendered November 30, 1888, by a sale of his real estate for the payment of said judgment and other liens mentioned in the bill. Upon a reference to a commissioner to covene all lienors and ascertain their liens, a report was made ascertaining certain liens upon Miller's land, among them said Atkinson judgments, and denying any place as a lien to a debt of James Logie claimed by him before said commissioner under a writing purporting to be a deed of trust executed by Miller to Robert M. Duke, trustee, to secure said Logie's debt, dated September 20, 1867, and recorded October 16, 1867, because of the absence of a seal to said writing. Logie excepted to the report, because it failed to report said debt as a first lien on the real estate specified in said deed of trust. The court sustained Logie's exception, and in its decree made Logie's debt a first lien, and thus gave it priority over the Atkinson judgments as to said land embraced in said trust; and said Atkinsons have taken this appeal. It thus involves a contest between Atkinson's judgment, and the Logie debt.

This case presents the question whether a writing purporting to be a deed of trust, formal in all respects save the want of a seal, creates a lien on the land mentioned in it. Suppose a deed for a fee were executed without a seal. It would not pass the legal estate; for our statute provides that no estate in land, greater than a term of five years, shall pass except by deed or will. Code 1887, c. 71, s. 1. But a court of equity would not allow the intent of the parties, as manifested by the writing, to be wholly defeated by the omission of a seal, but would treat the instrument as a contract or agreement to convey, or a memorandum of such an agreement; and properly so, for he who executes an instrument using proper words of actual present conveyance, but which, for want of a seal, fails to do what the words were meant to do, as fully discloses a willingness and intent to convey, as if he executed an executory contract covenanting to convey in future. Accordingly, defective deeds signed by the parties, purporting to convey the legal title, but because of some defect not doing so, are treated in equity as agreements to con-

[1] S. C. 11 Southeastern Reports 1007.

vey; and specific execution of them will be decreed by providing for the execution of a formal and effectual conveyance. 1 Hill. Vend. 118; Opinion in *White* v. *Denman,* in extract given below. Opinions in *Goodson* v. *Beacham* 24 Ga. 154; *McWilliams* v. *Nisley,* 2 Serg. & R. 515; *Chew* v. *Barnett,* 11 Serg. & R. 391.

If such is the law as to a defective deed purporting to convey in fee, why not an instrument purporting to be a deed conveying in trust on like principles to be deemed a cortract tor a conveyance—that is for a conveyance in trust for a debt? The only difference is that the one is a conveyance absolutely, the other in trust to secure a debt. I suppose an instrument conveying to A., to be held in trust for B., could, if defective and not operating to convey the legal estate, be treated as evidence of an agreement to convey, which would be specifically executed. The only difference between the instruments is that one is in trust for the purpose of paying a debt, the other in trust for another purpose. In other words, in all these cases the defective instrument is treated as written evidence of the fact that the party did make an oral agreement to convey, and that is just what the statute requires—written evidence of the fact that a contract to convey was made. It is a formal memorandum of the agreement under the statute. In the face of such an instrument it could not be said there was no contract to convey.[1]

Let us now advert to another view of the effect of said deed of trust. Suppose that it is not a recordable paper under the statute; then the statute does not avoid it for want of recordation, for, of course, the statute avoids only such writings as it requires to be recorded. Therefore it is to be governed by the law, regardless of the statute. What character does it assume in this view? Certainly that of an equitable mortgage, under very many authorities. "Wherever it appears, by writing signed by the party to be charged, that, for a valuable consideration, such as an existing debt, a debt at that time first contracted, or otherwise, he intends to charge his property as security for money, whatever the form of the instrument, the court of equity will fully effectuate the intention of the parties concerned. Hence mere promises, powers of attorney, deeds imperfectly executed, and other written papers have been held to create equitable mortgages in the contemplation of courts of equity. *College* v. *Powell,* 12 Gratt, 387; *Ruffners* v. *Putney,* Id. 551; *Russel* v. *Russel,* 1 White & T. Lead. Cas. Eq. 674." 2 Minor, Inst. 297.

"A mortgage or trust-deed which cannot be enforced by a sale under the power or by judgment of foreclosure, on account of some informality requisite to a complete mortgage or deed of trust, will nevertheless be regarded as an equitable mortgage, and the lien will be enforced by special proceedings in equity. The attempt to create a security in

[1] Parts of the opinion dealing with the effect on the instrument of the recording statute and with the question of a purchaser for value without notice, has been omitted.

legal form, upon specified property, having failed, effect is given to the intention of the parties, and the lien enforced as an equitable mortgage." 1 Jones, Mortg. § 168.

In *Wayt* v. *Carwithen,* 21 W. Va. 516, it is held, that any deed or written contract used by the parties for pledging real property as security for a debt, which is informal and insufficient as a common-law mortgage, but which shows that the parties intended that it should operate as a lien or charge on the property, will be an equitable mortgage and enforced in equity. See also, *Knott* v. *Manufacturing Co.,* 30 W. Va. 790 (5 S. E. Rep. 266); *Fidelity etc. Co.* v. *Shenandoah R. Co.,* 33 W. Va. 761 (11 S. E. Rep. 58.)

This instrument being an equitable mortgage, and (let us suppose) not a recordable writing, and therefore not declared void as to creditors and purchasers by it, when tested by the general law regardless of the statute, what would be its *status?* It would be valid against creditors, though perhaps void as to subsequent purchasers for valuable consideration without notice.

It follows, therefore, that this defective deed of trust as an equitable mortgage being prior in time to the judgments of the appellants, takes precedence over them, though it might, in this latter view, be subordinate to deeds of trust. And so, whether we view this deed of trust as a contract for a conveyance recordable under the statute, which we hold it to be, or as an equitable mortgage recordable under the statute, or as an equitable mortgage not recordable under the statute, it is to be preferred to the judgments of the appellants, and on both grounds their appeal is not well taken. Therefore, we affirm the decree.

AFFIRMED.

G.—EQUITY REGARDS THAT AS DONE WHICH OUGHT TO BE DONE.

DAVIE *v.* BEARDSHAW.

IN CHANCERY, BEFORE LORD CHANCELLOR CLARENDON, 1664.

[1 *Cases in Chancery* 39.]

Davie agrees for the purchase of certain copyhold lands, which were surrendered out of court for his use; but before admittance he dies, having other copyholds, and having made his will after the said contract, and thereby devised to the plaintiff, (who was then and at his death his visible heir) all his copyholds after his death; his wife being *priviment enseint* at his death, is delivered of the defendant's wife, who

then becomes the heir of the devisor. The plaintiff taking it for granted that the copyholds so contracted for, did not pass by the will, suffered the heir to be admitted thereunto, and held the same of the heir for twenty years, and paid her rent for that time, and had agreed so to do as long as he should hold them. Afterwards differences arising between the heir and him about other matters, the plaintiff exhibited his bill (*inter alia*) to have those copyhold lands decreed him. And it was declared upon the hearing by the court, that it was clear the said copyholds so agreed for did pass by the will to the plaintiff, for that the purchaser had an equity to recover the land, and the vendor stood trusted for the purchaser, and as he should appoint, till a conveyance executed. And the case of the lady Fohaine, about 1657, was cited, where it was ruled, that if upon articles for a purchase, the purchaser dieth, and deviseth the land before the conveyance executed, the land passeth in equity. But in the principal case, inasmuch as the plaintiff had admitted the title to be in the heir, and paid her rent, and agreed so to do, the court would not decree it; but declared, if the plaintiff had come in time, it was proper to be decreed.

FREDERICK *v.* FREDERICK.

IN CHANCERY, BEFORE LORD CHANCELLOR MACCLESFIELD, 1719.[1]

[1 *Peere Williams* 710.]

The bill was brought by *Leonora Frederick*, widow, for the performance of her marriage agreement.

The court of aldermen of *London* agreed upon the following: "That when any person not free of the city should address themselves to the court for a license to marry any orphan of the city, that they should first be required and urged by the Court to take up their freedom, before the court would give consent to such marriage."

The complainant was an orphan of the city. To secure the sanction of the city to their marriage, her husband had, before marriage, agreed with the aldermen to take up his freedom. The husband never became a freeman. In his later years, he became completely estranged from his wife and most of his children. At his death a will was found in which

[1] "Macclesfield was an able judge both at common law and in equity. Though his fame as a common law chief is not quite equal to that of his immediate predecessor, Sir John Holt, his authority upon all points, whether of a practical or obstruse nature, is now as high as that of Nottingham, Somers or Hardwicke. Campbell, Lives of the Lord Chancellors vi. 11, 22."—Dictionary Biography, Article, Parker.

he bequeathed £1000 to each of his five children, £10 to his wife, the bulk of his estate going to the grandchildren of his second son. By the custom of *London,* the widow of a freeman was entitled to one third her husband's personal property on his death.[1]

His widow now brought her bill, insisting that her husband having made the agreement *ut supra,* for a valuable consideration, (*viz.*) that of marriage, and to induce the court of aldermen to consent to his marrying the orphan, he ought to be taken as a freeman, and in consequence thereof, his personal estate to be distributed as such, (*viz.*) the widow to have one third, his children another third, and only the remaining third to pass by the will.

The *Lord Chancellor,* after debate of this case at the bar, took time to consider of it; and this day (being the 25th of *August* 1721,) decreed the personal estate of Mr. *Frederick* to be liable to the custom of *London,* and that he should be taken as a freeman of *London,* he having for a valuable consideration agreed to become such.

The demand is grounded upon this rule, that where one for a valuable consideration agrees to do a thing, such executory contract is to be taken as done; and that the man who made the agreement shall not be in a better case, than if he had fairly and honestly performed what he agreed to. This is to be taken as a contract made by the court of *aldermen* with Mr. *Frederick* himself; and now the question is, whether he shall by will give away his personal estate, contrary to his own agreement? When Mr. *Frederick* engaged to take upon himself the freedom of the city, it was the same as if he had agreed that the personal estate which he might die possessed of, should go according to the custom of the city of *London,* one third to his widow, and another third to his children.[2]

Object. Mr. *Frederick's* death alters the case; for he cannot be made a freeman after his death; and so the act of God makes it impossible that this agreement should be specifically performed.

Resp. It is the substance and the chief end of the argument, that equity will enforce, *viz.* that the widow and children should have their thirds of the personal estate, *which* is not impossible to be performed. This, though Mr. *Frederick* be dead, a court of equity may, and I think, ought to see executed. Mr. *Frederick's* unkind usage of his wife and children (it appearing by the proofs that never had a man a more dutiful wife and children, nor ever a wife or children a more unkind husband or father, and not one witness being examined on the other side) plainly entitles them to the compassion of the court, as does the extreme severity of the will, and the very narrow provision made for them thereby, 'Tis farther observable, that by the articles of separation between Mr. *Frederick* and his wife and children, they were not to come within so many yards of his house, under certain penalties; and therefore cannot be blamed *for going from the testator in his life-time, and in his old age,*

[1] This statement of facts is abridged.

[2] A considerable part of the opinion is omitted.

without his leave, and against his consent, when, by those articles, they were not to come within so many yards of his house without a forfeiture.

Upon the whole matter, Mr. *Frederick* having upon good consideration made the agreement to become a freeman of *London* within a year, and having survived that year, he shall in equity be taken for a freeman, and his personal estate distributed accordingly, *viz.* one third to the wife another third to the children, and the will to operate only on the dead man's third; the wife to have the benefit of her chamber and paraphernalia, but the legacies given by the will to the children to be void, they not being given out of the dead man's part, but out of the whole personal estate, and so to be void, unless the children release their right to the rest of the estate, and abide by the will.

This decree was afterwards affirmed in the house of lords with 200 *l.* costs.

GREEN *v.* SMITH.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1738.

[1 *Atkyns* 572.]

A. articles for the purchase of lands, and dies; it happened afterwards that the seller could not make a good title to the lands, and the question was between the heir at law, and the executor of *A.* Whether the purchase money was to be considered as land or personal estate?

Lord Chancellor, in this cause, laid down the following rules:

That agreements to be performed, are often considered as performed: for if a man *covenants* to lay out a sum of money in the purchase of lands, generally, and devises his real estate before he has made such purchase, the money *agreed* to be laid out will pass to the devisee.[1]

[1] "Nothing was better established than this principle, that money to be directed to be employed in the purchase of land, and the land directed to be sold and turned into money, are to be considered as that species of property into which they are to be directed to be converted; and this in whatever manner the direction is given; whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land. The cases establish this rule universally." *Per Sir Thomas Sewall, M.R.,* in *Fletcher* v. *Ashburner* (1779) 1 *Bro. Ch.* 497, 499; *S. C.* 1, *pt.* 2, *White & Tudor's Leading Cases in Equity,* 4*th Am. ed.* 1118.

"Concerning money set apart for such expenditure it is said: 'It is land: it will pass by the words 'messuages, lands, tenements and hereditaments:'

That where a man having made his will, afterwards enters into a contract for the purchase of land, the lands contracted for will not pass by the will, but descend to the heir at law.

That where an ancestor, after the making of a will, agrees for the purchase of particular lands, the heir at law would have a right to them, provided a good title can be made, otherwise if it cannot; but it is going too far to say that though the heir at law cannot have the land, yet he shall have the money so intended to be laid out.

That if a man gives a portion to his daughter by a will, and afterwards advances her with the like sum, it shall go in ademption of the legacy.

That *the vendor* of the estate is, from the time of his contract, considered as a trustee for the purchaser, and *the vendee* as to the money, a trustee for the vendor.

That in bills for specifick performance, this court never gives relief where the act is impossible to be done, but leaves the party to his remedy at law.

the heir at law would be entitled to the whole." *Per Lord Chancellor Eldon, Green* v. *Stephens* (1810) 17 *Ves.* 64, 77.

The same rule governs in contracts giving an option. In *Lawes* v. *Bennet* (1785) 1 *Cox Ch.* 166, the facts and ruling were as follows: "A person named Whitrong, in 1758, demised to Douglas for seven years, with a covenant, that if, after the 29th of September, 1765, Douglas should choose to purchase the inheritance for 3000 *l.* Whitrong would convey accordingly. Whitrong died in 1761; no election having been made by Douglas; and left all his real estate to the defendant Bennet, and all his personal estate to Bennet and his sister, equally as tenants in common. In 1765, before the 29th of September, Waller, who had purchased the lease and the benefit of the agreement from Douglas, called upon Bennet, the devisee of the real estate, to convey upon payment of 3000 *l.* The bill was filed in 1781, by Lawes, the husband of Bennet's sister, against the personal representative of Bennet the brother, claiming a moiety of 3000 *l.* and interest, and Lord Kenyon made the decree accordingly, observing, that though Whitrong could not have compelled Douglas to purchase, the money was, at the time of the election, declared to be considered as the personal estate of the testator, and did not belong to the devisee of the real estate." [Statement from Townley *v.* Bedwell (1808) 14 *Ves.* 591.] Lord Kenyon said: "When the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is that the real estate is converted into personal at a future time."

"The settled doctrine of the courts of equity correspond with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. [The court then quoted the passage from *Fletcher* v. *Ashburner*, supra, and proceeded.] This declaration is well warranted by the cases to which the master of the rolls refers, as well as by many others. (See *Dougherty* v. *Bull*, 2 *P. Wms.* 320. *Yeates* v. *Compton*, *id.* 358. *Trelawney* v. *Borth*, 2 *Atk.* 307.)

In Craig *v.* Leslie (1818) 3 *Wheat.* 563, 577, Mr. Justice WASHINGTON said:

That where an ancestor has agreed for the purchase of particular lands, but dies before it is quite completed, if the heir at law brings his bill against the devisees, who claim the real estate of the ancestor by a will made before the purchase of those particular lands, the vendor of these lands, where he has a doubtful title, must be made a defendant to the suit, otherwise if his title be clear.

SCUDAMORE *v.* SCUDAMORE (1720) *Prec. in Ch.* 543, 544.—*Note;* In this case it was agreed by my LORD CHANCELLOR [MACCLESFIELD] to be a declared rule in this court, that if money be devised to be laid out in the purchase of lands, to be settled on one and his heirs, that the person himself, for whose benefit the purchase was to be made, may come into this court, and pray to have the money itself, and that no purchase may be made, because none have an interest in it but himself; but if he dies before the purchase made, or payment of the money, so that the question comes between his heirs and executors, which of them shall have the money, the heir shall be preferred, and it shall for his benefit be considered in a court of equity, as if the purchase had been actually made in the life of his ancestor, for two reasons: 1st, Because the heir is to be favoured in all cases, rather than the executors, who by the old law were to have nothing to their own use. 2dly, If the executor should have it, it would be against the words of the will, which gave it to the heir.

"The principle upon which the whole of this doctrine is founded is that a court of equity regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of a more precise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity."

"It must be allowed equity follows the contracts of parties, in order to preserve their intent, by carrying it into execution, and depends on this principle, that what has been agreed to be done for a valuable consideration is considered as done, and holds in every case except in dower; and therefore where it is to be laid out in land, there the court will make it have the property of land; the same rule of lands to be converted into money."—*Per Lord Hardwicke* in *Crabtree* v. *Bramble* (1747) 3 *Atk.* 680, 687.

"But equity will not thus consider things in favor of all persons, but only in favor of such as have a right to pray that the acts might be done. And the rule itself is not in other respects of universal application; although Lord Hardwicke said that it holds in every case except in dower. * * * There are exceptions to the doctrine where other equitable considerations intervene, or where the intent of the party leads the other way; but these demonstrate, rather than shake, the potency of the general rule."—*Story* 1 *Equity Jurisprudence* § 64 *g.*

See, for an elaborate discussion of the doctrine of conversion, 2 *Spence Jurisdiction of Court of Chancery* 251, (*Pt.* 3, *b.* 1, *c.* 6, § 4).

BURGESS *v.* WHEATE (1759) 1 *Eden Ch.* 177, 186.—*Per* SIR THOMAS CLARKE, M. R.[1]—First: The claims of the plaintiff Burgess as heir-at-law *ex parte materna,* in default of an heir *ex parte paterna.* This claim I see no ground for, considering the certificate of the judges, which Lord Keeper proposes to confirm.

The questions stated for B. R. have left the point open for the maternal heir, if there was any ground of right, and their answers have effectually precluded him, in case he has no equity. And what ground of equity has he?

What has been insisted on is mere matter of law, and would open the questions again which are concluded. For, by the deed of 1718, it is held he took nothing; that the trustee thereby took the legal estate, and no new use was created by Mrs. Harding.

The only thing suggested by that side, which has the colour of equity, is, that Mrs. Harding might have prayed and compelled a conveyance from the trustee whilst she lived, by which she would have been seized to new uses; which, in default of heirs *ex parte paterna,* would have gone to the heirs on the part of the mother: and that is a rule of equity. "That what ought to be done, or is agreed to be done, is looked upon as done."[2]

Had such a conveyance been executed, it would have been like a feoffment and re-feoffment, and have made her seized of a new use; but, as it was not done, the consequences insisted on will not follow; for nothing is looked upon in equity as done, but what ought to have been done, not what might have been done. Nor will equity consider things in that light in favour of every body; but only of those who had a right to pray it might be done. The rule is, that it shall be either between the parties who stipulate what is to be done, or those who stand in their

[1] For statement of facts, see case as reported, supra.

[2] Speaking of the reversal in Kettleby *v.* Atwood (1684) 1 *Vern.* 298 by Lord Jefferies, in 1 *Vern.* 471 (1687), Lord Chancellor Thurlow said: "The first doubt arose and the reversal proceeded upon the cant expression, that in equity what is to be done is to be considered as done: either that idea should have been fully carried out, or it should have been abandoned. I think it should have been the latter."—*Pulteney* v. *Darlington* (1783) 1 *Bro. Ch.* 223, 237.

"But the covenant to convey is, in equity, equivalent to a conveyance, and I do not apprehend that, for the present purpose, it makes any difference whether the lands are directly conveyed to trustees for sale, or covenanted to be conveyed to them for that purpose. That which is covenanted to be done is considered as done."—*Per Sir William Grant, M. R.,* in *Stead* v. *Newdigate* (1817) 2 *Meriv.* 521, 530.

"Whatever is agreed to be done is considered in equity as done. It follows, from this principle, that a contract for the sale of real estate is considered, in equity, as a conversion of land into money. The vendor's interest ceases to be real estate. It becomes a chose in action, a personal demand for the consideration-money, which, in case of death, goes to his personal representatives,

place. Here Mrs. Harding never prayed a conveyance, and one cannot tell whether she ever would; and the maternal heir is not to be considered as a privy in blood, but a mere stranger.

This very cause warrants the distinction here taken, *i. e.* with regard to the mill, &c. mentioned in the opinion on the last question. It stands thus: Nicholas Harding, after having agreed to release to Chandler the equity of redemption of a moiety of the mortgaged premises, agrees to purchase of Chandler the mill, &c. and makes Chandler stipulate to convey these premises to him and his heirs, or such person as he shall direct. The equity of redemption was released, and then Chandler stipulates to convey to Harding and his wife, and the survivor of them, and the heirs of the survivor; the consequence is, that Mrs. Harding takes this estate, not as the old use, but by purchase, under the appointment of her husband, which enlarges the course of descent beyond that of the old use. And since what is covenanted to be done is considered done, the mill goes in a course of descent (in fault of paternal heirs) to the heir *ex parte maierna*. In the deed of 1718 there is nothing like such a covenant, nor any thing which shews she intended to enlarge the course of descent. Wherefore under these circumstances, as the opinion of the judges is proposed to be confirmed, I think there is ground for the claim of the maternal heir.

BUSH *v.* BOUTELLE.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1892.

[156 *Massachusetts* 167.]

MORTON, J. The question in this case is whether the deeds from Cyrus F. Boutelle to the defendant were given in contravention of the insolvent law.

It is stated in the agreed facts, that at the time the defendant took them, and when the loan was made for which they were given to him as security, Cyrus was insolvent and knew himself to be so, and the defend-

and the legal title is held only as a security for the payment of the debt. The vendee becomes in substance the owner of the estate. In his hands it is subject to dower curtesy, and to all the incidents of real estate; and upon his death it goes to his *heirs* and not to his *personal* representatives. This conversion takes place notwithstanding that it may afterwards be defeated by the non-payment of the purchase-money. Even when the conversion is subject to the happening of a contingency, the property will be taken to be as of the nature it was *intended to be upon the happening of the contingency:* Lawes *v.* Bennett, 1 Cox Ca. Ch. 167; Leigh & Dalzell on Equit. Conversion 19."—Per LEWIS, J., in Longwell *v.* Bentley (1854) 23 Pa. St. 99, 102.

ant had reason to believe him to be so. It is not stated that the deeds were taken or that the money was advanced by the defendant with a view to enable Cyrus to prefer the bank, or to evade in any way the insolvent law. That is denied in the defendant's answer. We understand the question, therefore, to be whether, on the agreed facts as thy stand, without anything more, the deeds as matter of law were in contravention of the insolvent law.

It appears that Cyrus had a note coming due at a bank in Fitchburg. The day before it fell due the indorsee declined to renew it. Cyrus thereupon applied to the defendant, saying that the action of the indorsee put him in a tight place, and asking the defendant to get the money for him on his (Cyrus's) note, and saying he would give the defendant security on two lots, naming them, either by mortgage or warranty deed. Instead of getting the money in the manner Cyrus suggested, the defendant himself advanced the money and kept the note, which was dated April 10, 1889. Owing to his absence at Worcester as a witness, and by reason of other pressing business, Cyrus was unable to complete the transaction till April 23, when he made and delivered as security to the defendant warranty deeds of the two lots.

The petitioner contends that the arrangement between the defendant and Cyrus contemplated the giving of security at a future time, and not as a part of or contemporaneous with the lending of the money, and that when the defendant received the deeds he took them as an unsecured creditor receiving security for an unsecured debt. We do not think the transaction can be so regarded.

The proposal to give security was made at the same time as and as a part of the request for the loan. It was made before the money was lent, to induce the lending of it, and the money was lent, for aught that appears, in good faith on the promise of the security. The only reasonable construction to be given to the letter of Cyrus is that it was expected and intended by the parties that the lending of the money and the giving of the security would be contemporaneous, and that Cyrus understood that he was to give, and the defendant that he was to receive, present security for a present loan. The accidental delay could not affect the real character of the agreement, or what was done. The situation of the debtor remained unchanged, and there is nothing to show that the delay was for the purpose of giving credit. When the security was given, equity would treat it—on the principle that a thing is considered done at the time when it ought to have been done—as if it had been given at the time agreed, and at law possibly the interval might be disregarded, and the agreement and the giving of the deed be regarded as contemporaneous. *Gardiner* v. *Gerrish*, 23 Maine, 46. 1 Story, Eq. Jur. § 649. *Nickerson* v. *Baker*, 5 Allen, 142. *Hawks* v. *Locke*, 139 Mass. 205. *Commonwealth* v. *Devlin*, 141 Mass. 423, 431. *Cartwright* v. *Wilmerding*, 24 N. Y. 521, 533, 534.

The cases relied on by the petitioner on this branch of the case are

readily distinguishable from this case. In *Blodgett* v. *Hildreth*, 11 Cush. 311, the agreement to give security was clearly executory, and at the time the security was given there was clearly an antecedent debt. In *Forbes* v. *Howe*, 102 Mass. 427, a former mortgage was surrendered and a new one was taken on other property to secure a debt that had existed some time. The second mortgage was clearly invalid. The same is in substance true of *Simpson* v. *Carleton*, 1 Allen, 109. *Holmes* v. *Winchester*, 135 Mass. 299, is the strongest case cited by the petitioner, but the conveyance which was the subject of controversy was not made till two years and four months after the time when it should have been made. The court expressly said that the evidence was "consistent with the view that she [the plaintiff] did not expect a present conveyance from her husband, but left it to be made by him at some time in the future." The case of *Copeland* v. *Barnes*, 147 Mass. 388, stands on the same ground in effect as *Forbes* v. *Howe*, 102 Mass. 427, as does also *Paine* v. *Waite*, 11 Gray 190.

On the other hand, we think the view which we have taken is supported by numerous authorities. *Williams* v. *Coggeshall*, 11 Cush. 442. *Nickerson* v. *Baker*, 5 Allen, 142. *Stetson* v. *O'Sullivan*, 8 Allen, 321. *Alden* v. *Marsh*, 97 Mass. 160. *Parsons* v. *Topliff*, 119 Mass. 245. *Atlantic National Bank* v. *Tavener*, 130 Mass. 407. *Holmes* v. *Winchester*, 133 Mass. 140. *James* v. *Newton*, 142 Mass. 366. *Tiffany* v. *Boatman's Institution*, 18 Wall. 375. *Cartwright* v. *Wilmerding*, 24 N. Y. 521. *Ex parte Ames*, 7 Nat. Bankr. Reg. 230. *Sparhawk* v. *Richards*, 12 Nat. Bankr. Reg. 74.

The fact that the agreement related to the conveyance of real estate was not, in *Nickerson* v. *Baker*, 5 Allen, 142, regarded as a valid objection. Moreover, the agreement has been executed and the defendant has got his security, and as the court said in *Holmes* v. *Winchester*, 135 Mass. 299, 302, "can set up * * * any equities that will avail her." As already said, the money was lent and the security taken, for aught that appears, in good faith. It is not enough to avoid the conveyance, that Cyrus was insolvent when it was made, and knew himself to be so, and that the defendant had reason to believe him to be so, if the conveyance was not made to secure an antecedent debt, or with any intention on the part of the defendant to defeat the provisions of the insolvent law, or with reason to believe that such was the purpose of Cyrus, but was given as security for a debt then incurred.

It does not appear from the agreed facts that the defendant had any reason to believe that there was to be any fraud upon, or evasion of, the provisions of the insolvent law. A majority of the court think that the decree of the Superior Court should be reversed, and that, as it is conceded that the deeds were taken as security, a decree should be entered to that effect, allowing the assignee, if he shall so elect, to redeem within a certain time, upon paying what shall appear to be due; otherwise,

Bill to be dismissed with costs.

SOURWINE *v.* SUPREME LODGE, KNIGHTS OF PYTHIAS.

IN THE APPELLATE COURT OF INDIANA, 1894.

[12 *Indiana Appellate Court* 447.]

The appellants are the beneficiaries of one Jonathan Croasdale who, in 1877, was admitted to membership in the appellee's endowment rank, entering classes first and second. At this time all members paid at the same rate. In 1884 a fourth class was created in which the amounts to be paid were graduated according to age. In 1888, by amendment to the constitution, transfers from the first, second and third classes to the fourth class were permitted, upon passing a medical examination which should be properly certified and upon payment of a necessary fee "before he can take the obligation admitting him to membership." The applicant was obliged to surrender his endowment certificates held in the other classes. The age limit, fifty years, imposed upon new applicants for admission to the fourth class was by express terms not to apply to members transferring from the lower classes to the fourth class. In March, 1889, Croasdale being then a member in good standing of the first and second classes, asked to be transferred to the fourth class. He was examined by appellee's physician, found to be in perfect mental and physical health, and was unconditionally recommended by the physician. Croasdale properly forwarded to the appellee's medical examiner-in-chief his application, with the proper fees, offering to surrender his certificates, but that officer arbitrarily disapproved the examination and peremptorily rejected the application for no other reason than the applicant's age.

On March 20, 1889, and on Jan. 30, 1891, Croasdale renewed his application and was met with the same arbitrary refusal.

On May 5, 1892, Croasdale died. The first and second classes had then become so depleted that they paid but trifling sums to beneficiaries. Proper proofs were made and the appellants in this action seek to recover upon the ground that Croasdale was equitably a member of the fourth class.[1]

GAVIN, J. Clearly, Croasdale possessed all the necessary qualifications, complied strictly with the requirements of appellee's constitution, and was in fact entitled to be, and under the allegations of the pleadings, ought to have been, transferred.

Appellee's position is that nevertheless he was not transferred in fact, and could not be without the approval of the medical examiner-in-chief, and for this reason his beneficiaries can not recover.

It is further contended that he had, by not asserting his legal right

[1] This statement of facts is abridged. The part of the opinion relating the facts is omitted.

to the transfer and not tendering the dues, acquiesced and abandoned his right to the transfer.

The constitution and by-laws of such an organization are elements of the contract of insurance.

They measure and determine the member's duties and liabilities, and not only these but his rights as well. *Supreme Lodge K. of P.* v. *Knight*, 117 Ind. 489.

Not only the private members, but the officers, are under obligation to conform their conduct to them.

Under the averments, the action of the medical examiner-in-chief, in rejecting the application solely by reason of Croasdale's age, was in direct violation of the constitution.

Croasdale's fellows in the first and second classes had been permitted to transfer, and thus his classes had been depleted. In so doing they and the association only exercised their legal right, but the right to follow them was vested, by the constitution, in Croasdale. He was already a member of the rank, and this right of transfer was a contract right, and a beneficial one of which the officers could not arbitrarily deprive him. *Supreme Council, etc.*, v. *Forsinger*, 125 Ind. 52; *Supreme Lodge K. of P.* v. *Knight, supra.*

His position was manifestly radically different from that of one who was not a member of the organization, but was seeking admission into its ranks, as in the case of *Matkin* v. *Knights of Honor*, 82 Tex. 301. The contractual rights and obligations were already existing between him and the association.

Having done everything that was to be done by him to effectuate the transfer, and being in all things entitled to it, it did not rest in the discretion of the examiner to refuse him. Had the examiner refused him because he was not, in his judgment, possessed of the proper physical qualifications, it might well be that the examiner's action, in the absence of fraud or mistake, at least, would be final and conclusive against him; but no such question is here presented. On the contrary, the disapproval is arbitrary and without cause, solely by reason of his age, which, by the express letter of the society's law, is not a reason for rejection.

Here is a manifest wrong. Yet it is asserted that although there was a wrong there is now no remedy. To so hold would be, to use a favorite phrase of Judge ELLIOTT'S, a reproach to the law. The arm of the law has not been so shortened as to leave the appellants remediless.

If the application of the stricter rules of law, as formerly administered, do not furnish the remedy, the more expansive and beneficent principles of equity are ample for the purpose.

An eminent law writer speaks thus: "Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application, the court of equity has the power of devising its remedy and shaping it

so as to fit the changing circumstances of every case and the complex relations of all the parties." 1 Pom. Eq., section 109.

Again he says, at section 111: "It has, therefore, never placed any limit to the remedies which it can grant; either with respect to their substance, their form, or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed."

While this case is one of a peculiar nature, *sui generis,* for which neither the counsel nor the court have found any direct precedent, the application of a familiar rule of equity furnishes, as it seems to me, a safe guide to its disposition.

That this application ought to have been approved and that the transfer ought to have been made can not be successfully controverted, nor are these propositions denied by appellee's counsel. They assert, however, that while these things ought to have been done they were not. Equity furnishes the remedy for just exactly that state of affairs, for the very first maxim with which we meet in equity is that it "will regard that as done which in good conscience ought to be done." This principle has been applied, says the same author, "to every instance where an equitable *right,* with respect to the subject-matter, rests upon one person towards another: to every kind of case where an affirmative equitable duty to do some positive act devolves upon one party and a corresponding equitable right is held by another party." Pom. Eq., section 364; vide, also, sections 369 and 370.

In *Kentucky, etc., Ins. Co.* v. *Jenks,* 5 Ind. 96, it was objected that there could be no recovery because no policy had issued, but the court said: "Jenks having been entitled to a policy in his lifetime, a court of equity will consider that done which should have been done," and sustained a decree for a satisfaction.

So, also, in *Woody* v. *Old Dominion Insurance Co.,* 31 Gratt. 362, and *Tayloe* v. *Merchants' Fire Insurance Co.,* 9 How. (U. S. R.) 390, where insurance contracts were to be, but had not been, issued, it was held that equity would enforce payment of the losses directly without there having been a previous decree for specific performance.

So equity will grant relief here, althought Croasdale never in his lifetime compelled the transfer, by mandate, as he might have done.

We do not think it lies in appellee's mouth to complain that some hardship may be imposed on it by reason of his failure to insist on his rights in a court of law before his death.

For whatever hardship may arise therefrom, appellee, and not he, is responsible.

Neither do we think that appellee is in a position to take any advantage from the plea that by allowing this action appellants are per-

mitted to reap the benefits of Croasdale's membership without his having borne the burdens. That he did not bear these burdens during the fifteen months after the final rejection of his application for transfer was due entirely to the wrongful conduct of appellee, and can in no degree be ascribed to any delinquency upon his part. Whatever unpleasant results may follow from appellee's own misconduct should be borne by appellee, and can not be shifted to others who are wholly innocent.

It is a well known maxim that parties are not to be permitted to take advantage of their own wrong.

In *Jackson* v. *Northwestern, etc., Relief Assn.,* 78 Wis. 463, we find a case closely analogous to the one under consideration. The membership of the deceased had there been declared forfeited, but there was, under the by-laws, a right to reinstatement on certain terms, among which was furnishing a satisfactory certificate of health. The member took the necessary steps, and mailed the application and money, with a proper certificate of health, but died before these were received at the office of the association, which thereupon, after notice of her death, rejected the application for reinstatement.

It is said by the Supreme Court, per ORTON, J.: "The court instructed the jury on that subject as follows: 'That Mrs. Jackson was dead before the reinstatement and money reached Madison, if you find such to be the fact, was good cause for the disapproval of her application.' This instruction was also erroneous. If Mrs. Jackson mailed the papers and money in proper time, according to the by-laws or the custom of the company, her rights became fixed by it, and her subsequent death, before the package reached the company, could not change them. She had done all that the company required of her by the notice of reinstatement."

Again it is said: "The court erred also by instructing the jury that the company had the right to reject her application for reinstatement 'upon the ground that it did not consider her statements in regard to health sufficient.'

"If Mrs. Jackson secured any right whatever by so responding to this last reinstatement notice of the company, then the certificate of health she sent with the other papers and the money did not depend upon how the company considered it, but upon its sufficiency in fact."

Thus it is held that one may be by the courts regarded as entitled to the rights of membership although not recognized as such by the officers.

By deducting from the sums due appellants the amount of dues which would have been collectible from Croasdale in the fourth class, appellee will be in the same position it would have occupied had it complied with the requirements of its own laws and made the desired transfer.

Appellee's laws are, as we have said, made for the government of its officers, as well as its members. Had the officer obeyed the law, as Croasdale did, all controversy would have been avoided.

After Croasdale had so fully complied with appellee's rules we do not

think he can be deemed to have acquiesced in its officer's wrongful conduct and to have abandoned his legal and equitable rights merely because he did not commence a mandate or make a formal tender of fourth class dues, which would have been useless in the face of appellee's continued refusal to make the transfer, which was equivalent to an announcement that it would not receive dues from him in that class.

Our conclusion, therefore, is that the trial court erred in sustaining the demurrer to the complaint.

Judgment reversed.

REINHARD, J., did not participate.

Filed April 25, 1895.[1]

H.—EQUITY IMPUTES AN INTENT.

KIRRINGTON *v.* ASTEY.

IN CHANCERY, 1637.

[*Tothill* 78.]

The grandfather deviseth lands to his son to pay ten pounds per annum to the son's three daughters, the father gives two hundred pounds in marriage with one, whether the ten pounds per annum should be included in the two hundred pounds or not; decreed it shall be included.

WILCOCKS *v.* WILCOCKS.

IN CHANCERY, BEFORE LORD KEEPER COWPER, 1706.

[2 *Vernon* 558.][2]

The plaintiff's father upon his marriage covenanted to purchase lands of 200l. *per ann.* and to settle the same upon himself for life, and on his wife for her jointure, and to the first and other sons in tail, remainder to the daughters. The father, who was a freeman of the city of *London*, died intestate, having purchased lands of the value of 200l. *per*

[1] As suggested by Judge Gavin in the principal case, Professor Pomeroy considered most important the maxim—equity regards that done which ought to be

[2] *S. C.* 2 *White and Tudor's Leading Cases in Equity, pt.* 1, 833, *4th Am. ed., with notes.*

ann. but made no settlement thereof, but permitted them to descend upon the plaintiff his eldest son; who now brought a bill founded on his father's marriage-articles, to have 200l. *per ann.* purchased out of the personal estate, and settled to the uses in the marriage-articles.

Lord Keeper [COWPER]. The lands descended, being of 200l. *per ann.* and upwards, ought to be deemed a satisfaction of the covenant, and decreed it accordingly; and that the personal estate should be divided and distributed amongst the *three* children, according to the custom of the city of *London*, and the statute for settling intestates estates.

One of the daughters having attained the age of *seventeen* years, made her will, and devised her personal estate.

Per Cur. The will is good as to the share that belonged to her by the statute; but as to her orphanage share, she dying unmarried before *twenty-one*, it survives to the other orphans by the custom, and her will could not take place upon her orphanage part.[1]

CUTHBERT *v.* PEACOCK.

IN CHANCERY, BEFORE LORD CHANCELLOR COWPER, 1707.

[1 *Salkeld* 155.]

H. owed his niece A. 100l. by bond, and having two other nieces B. and C. makes his will, and bequeaths 300l. to his niece A. and to his two other nieces 200l. a piece. After that he borrowed another 100l. of his niece A. and being indebted to her in 200l. died; and to prove the 300l. should go in satisfaction of the debt, Mr. *Vernon* insisted, that it was the rule in equity, and had been often decreed, that where a testator being

done. He stated it to be fundamental to the doctrines and rules governing all kinds of equitable property; the interpretation and effect of an executory contract in equity, including contracts for the purchase and sale of lands, assignments of possibilities, sales of chattels to be acquired in future, assignments of things in action, equitable assignments of moneys, and equitable liens; express trusts; trusts arising by operation of law; and the equity of redemption in mortgages. *Pomeroy, Equity Jurisprudence* § 364 *et seq.*

[1] "*Wilcocks* v. *Wilcocks* was decided in accordance with the rule of equity, that, where a person covenants to do an act, and he does that which may either wholly or partially be converted to or towards a completion of the covenant, he shall be presumed to have done it with that intention." *Reporter's note.* 2 *White and Tudor, supra, p.* 835. And see *Bispham's Principles of Equity* § 46.

Under the maxim, Equity will not suffer double satisfaction to be taken, Francis has collected a considerable number of cases involving the same principle as *Wilcocks* v. *Wilcocks*. *Maxims* 41.

indebted, gives his debtee a legacy greater than his debt, it shall go in satisfaction; for a man shall be intended to be just before he is kind; otherwise where a legacy is less, for that is neither to be just nor kind, and shall not be taken to go in satisfaction of any part. *Cowper* Lord Chancellor said, it might be as good equity to construe him to be both just and kind, if he intended to be both; that if any part of 300l. be applied to the payment of the debt, as for so much it is not a gift, whereas a legacy must be taken to be a gift or gratuity: and there being assets and some proofs of the testator's greater kindness to A. than his other nieces, his lordship decreed her the whole 300l. over and above her debt.

BLANDY *v.* WIDMORE.

In Chancery, before Lord Chancellor Cowper, 1716.

[1 *Peere Williams* 324.] [1]

Upon the marriage of *A.* with *B.* there were articles reciting, that, in consideration of the marriage and of the portion, it was agreed, that if *B.* the wife should survive *A.* her intended husband, *A.* should leave *B.* 620l. and accordingly *A.* covenanted with *B.'s* trustees, that his executors, within three months after his decease, should pay *B.* 620l. if she should survive him. *A.* died intestate, and without issue; upon which *B.* the wife, by the statute of distribution, became intitled to a moiety of the personal estate, which was much more than 620l. and the question was, whether the distributive share belonging to *B.* being more than 620l. should go in satisfaction of it?

Serjeant *Hooper:* This 620l. is a debt, and debts must be first paid, after which the distribution is to be made; and if the intestate had made a will, probably he would have given to his wife something additional to this 620l. Now, what the statute gives is not his gift, and being not his gift, is not to be taken as his payment; or supposing it to be his gift, still it cannot be said to be his payment.

Lord Chancellor [Cowper]: I will take this covenant not to be broken, for the agreement is to leave the widow 620l. now the intestate, in this case, has left his widow 620l. and upwards, which she, as administratrix, may take presently upon her husband's death; wherefore let her take it; but then it shall be accounted as in satisfaction of, and to include in it, her demand by virtue of the covenant; so that she shall not come in first as a creditor for the 620l. and then for a moiety of the surplus.

And Mr. *Vernon* said, it had been decreed in the case of *Wilcox* versus

[1] *S. C.* 2 *White and Tudor's Leading Cases in Equity, pt.* 1, *p.* 833.

Wilcox, Trin. 1706. That if a man covenants to settle an estate of 100l. *per annum* on his eldest son, and he leaves lands of the value of 100l. *per annum* to descend upon such son, this shall be a satisfaction of the covenant to settle; and that this last was a stronger case, it being the case of an heir, who is favoured in equity; also the case of *Phinney* versus *Phinney* was cited:

Whereupon the decree made by Sir *John Trevor* Master of the Rolls, was now affirmed by Lord Chancellor *Cowper.*

DEACON *v.* SMITH.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1746.

[3 *Atkyns* 323.]

In Easter Term 1742, Joseph Smith, the younger, brought his bill against Eleanor Smith, the widow and administratrix of Joseph Smith, the father, and the other defendants, his children by Eleanor, for an account and distribution of the father's personal estate, and for a discovery of the real estate which he was seised of at his death, and all mortgages, &c., and for an account of rents, and to be let into possession.

At the time of his marriage with Eleanor, the father covenanted that "the said Smith should and would convey and settle houses, lands, and tenements, or a rent charge issuing thereout, of the yearly value of forty pounds, on trustees, to the use of himself for life, and afterwards to Eleanor for life, in bar of dower, remainder to the heirs of Joseph Smith on the body of Eleanor, subject to a power to charge the estate of forty pounds *per ann.,* with three hundred pounds as a provision for the younger children of the marriage."

At the time of this agreement Smith owned no land, but afterwards purchased a freehold called Cheeseman's, of the yearly value of nine pounds and another freehold of the yearly value of forty pounds (an undivided moiety being subject to life estate of a widow), on which latter he already held a 1000 year mortgage, which he later assigned for the remainder of the term, for securing two hundred and fifty pounds. On the testator's death, the widow entered upon the Cheeseman estate and paid off the mortgage debt upon the other with the proceeds of the personal estate, taking an assignment to one Stephen for the use of the holder of the fee.

The widow insisted that the lands should be settled according to the marriage articles. The plaintiff contended that his father purchased the freehold estates with the intent that the plaintiff should inherit, and that the defendant's marriage agreement should be made good out of the personal property.

The Master of the Rolls declared for the defendant as to the Cheeseman estate, and an undivided moiety of the second estate in his possession; but for the plaintiff as to the moiety of the second estate not in the father's possession at the time of purchase. From this decree, the plaintiff, as devisee of Joseph Smith, the younger, who died after suit brought, now brings a bill of review.[1]

Lord Chancellor [HARDWICKE] took some time to consider, and this day gave judgment. The plaintiff's council have relied upon two objections. First, That there was no sufficient act appears to be done by Joseph Smith the elder, and covenantor, to affect or subject these lands to the articles. Secondly, That it might be prejudicial to purchasers and creditors, to construe these lands to be liable to the articles.[2] As to the first, I am of opinion, that there are not sufficient reasons to determine that these lands are not bound by the articles. In all these cases, the court have gone upon the intention of parties, and have not required that strictness as in the statute of frauds and perjuries; and many cases have gone so far, as to rely upon a strong presumption merely, without any positive evidence. What has governed the court is, that a man can be no contractor with his heir or executor, for they all derive under his will or permission; therefore, that the intention should be the rule, and turn the balance. The case of Lechmere *versus* Lechmere, the 13th of May 1735, I mention for the sake of the general ground, for there sir Joseph Jekyl laid it down, the intention ought to be the rule, agreeable to the judgment of three successive chancellors, lord Somers, lord Cowper, and lord Harcourt.

Lord Talbot, on the rehearing, laid down the same rule, and said, "the "cases upon satisfaction are generally between debtor and creditor; "and the heir is no creditor, but only stands in his ancestor's place: "one rule of satisfaction is, that it depends upon the intent of the party, "and that which way soever the intent is, that way it must be taken; "but this is to be understood with some restriction, as that the thing "intended for a satisfaction be of the same kind, or a greater thing, in "satisfaction of a less; for if otherwise, this court will compel a man to "be just before he is generous, and so will decree both:" but these questions, he said, are no ways material in this case, *which turns entirely upon lord Lechmere's intent at the time of the purchases made. Cas. in Chan. in Lord Talbot's Time* 92. I cite it, to shew, that both the master of the Rolls, and lord Talbot, who differed in opinion as to the point only of the fee-simple lands, purchased since the covenant, laid down the same general rule as to the intention. Therefore, I am of opinion, it is not material in this case, to require particular acts to be done; but if there is a sufficient presumption, it was the intention of Joseph Smith the elder, it should go according to the articles, *the land is bound by the articles.*

[1] The statement of facts has been abridged.

[2] That part of the opinion dealing with this objection is omitted.

I.—WHERE THE EQUITIES ARE EQUAL, THE ONE PRIOR IN TIME SHALL PREVAIL.

BLAKE *v.* SIR EDWARD HUNGERFORD.

IN CHANCERY, BEFORE LORD KEEPER WRIGHT, 1701.

[*Precedents in Chancery* 158.][1]

Sir *Edward Hungerford,* seised in right of his wife of the manor of *D.* procures her to join with him in a fine by way of mortgage in fee for securing 15000 *l.* and the equity of redemption thereof upon payment of the money is limited to Sir *Edward* for life, without impeachment of waste; remainder to the wife, and her heirs and assigns.

Sir *Edward* afterwards acknowledges a statute of 500 *l.* to *George Arnold,* to whom Sir *Jeremy Sambrook* is administrator; then the wife dies, and *Anthony Hungerford* was her son and heir. Sir *Edward Hungerford* contracted with *Anthony* his son, who had no notice of the statute, to sell him his estate for life in the manor for 3000 *l.* and accordingly *Anthony* procures 3000 *l.* more to be taken up upon the mortgage, and the mortgage to be transferred to the new mortgagee, who paid off the old ones, and furnished the 3000 *l.* to Sir *Edward Hungerford,* and the equity of redemption is limited to *Anthony,* and he covenants to pay the money; and the mortgagee's covenant on payment of the money to assign to him, or as he shall direct.

Then *Anthony* acknowledges a statute to one *Mellish* (who had no notice of the 500 *l.* statute) and after makes his will, and devises legacies to the plaintiffs and chargeth them on the said manor, and deviseth the manor itself to Sir *Edward Hungerford* and his heirs; and the great question was, Whether *Sambrook,* who had the interest of the statute acknowledged by Sir *Edward,* whilst he was tenant for life, or *Mellish,* who was *Conuzee* of *Anthony,* after his purchase of Sir *Edward's* estate for life, should be preferred in payment?

The Master of the Rolls decreed, that Sir *Jeremy Sambrook's* statute must come in after the creditors and legatees of Sir *Anthony Hungerford;* and that *Mellish* must come in immediately after *Anthony's* legacies, by virtue of *Mellish's* statute, *Mellish* having joined in the declaration of trust; and this decree was affirmed by my Lord Keeper, with the assistance of Mr. Justice *Blencow* and Lord Chief Justice *Trevor.*

The reasons urged for it were, that though neither had the legal estate, and that between two equities *que prior est tempore potior est jure,* yet that must be understood of bare equities, but in this case

[1] *S. C.* 2 *Eq. Cas. Abr.* 256.

Anthony Hungerford had more than a bare equity; that the case of *Smith* and *Christ's Hospital* did not come up to this case, for there was a term standing out, to which neither party had a right; but by *Anthony's* purchase the whole interest is united in him, and they who had the legal interest covenanted to assign to him, and are but his trustees after payment of the mortgage money, and it differs little from the common case, where a third mortgagee buys in the first mortgage in trust for himself, and *Anthony* may make use of his trustee's name at law, either to defend or recover, and may have an action at law against them to assign.

That though Sir *Edward's* equity for life would have entitled him, on payment of a third part, to redeem, and the 500 *l.* statute was a charge upon that equity, yet that is liable to be defeated by a subsequent incumbrancer without notice; but such purchaser must not be a purchaser of a bare equity only, for then the first will prevail: but *Anthony* is a purchaser of Sir *Edward's* equity, and the legal estate together, and will have the protection of the legal estate.

His deed of purchase takes notice of the case, and that the mortgage is assigned at his instance and by his procurement, and so he purchases the benefit of the legal estate, together with the equity.

If a third mortgagee takes only an agreement of the first mortgagee to convey to him, the second cannot in such case compel him to assign to him, because such agreement was no more than what they might have done without any agreement: and in this case *Anthony* is not entitled upon the old equity of Sir *Edward*, but on the new equity raised on the new mortgage; and he is an absolute purchaser of the estate subject to the mortgage, and must have the protection of it; and to decree a conveyance to Sir *Jeremy Sambrook*, would be to decree a breach of a fair and lawful covenant and agreement.

BRACE *v.* DUCHESS OF MARLBOROUGH.

IN CHANCERY, BEFORE SIR JOSEPH JEKYLL, M. R., 1728.

[2 *Peere Williams* 491.][1]

In this case it appeared that a puisne incumbrancer bought in a prior mortgage, in order to unite the same to the puisne incumbrance, but it being proved there was a mortgage prior to that, the court clearly held that the puisne incumbrancer where he had not got the legal estate, or where the legal estate was vested in a trustee, could there make no

[1] Only a part of this case is printed here.

advantage of his mortgage; but in all cases where the legal estate is standing out, the several incumbrances must be paid according to their priority in point of time: *qui prior est in tempore, potior est in jure.*[1]

CLARK *v.* ABBOT (1741) *Barnard Ch.* 457, 460.[2]—LORD CHANCELLOR [HARDWICKE] said his opinion was, That the Plaintiff was entitled to Relief as far as he can take that Relief within the compass of the former Decree. He said, if the Plaintiff had got the legal Estate, either in himself or a Trustee for him, so that he could have brought an Ejectment, and put the Defendants to have been Plaintiffs here, it might indeed have deserved Consideration, whether these Defendants would have been entitled to have redeemed the present Plaintiff. But as the Plaintiff has not the legal Estate, and is forced to come into Equity, he must submit to be redeemed by *Anthony Abbot,* who is one of the Defendants, and can put no other Terms upon his redeeming him, than such as fall within the Compass of the Decree, which has been mentioned. *Qui prior est tempore, potior est jure* is a rule that holds in Respect of equitable Rights as well as in Respect of legal ones.[3] In the present Case, *Robert* had the first equitable Right, and therefore his Mortgage must be paid off in Preference to that of the Plaintiff.

BERRY *v.* MUTUAL INSURANCE COMPANY.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1817.

[2 *Johnson's Chancery* 603.]

THE CHANCELLOR. The equitable rights of the parties, in this case, must have reference to the time when the knowledge of their respective mortgages was communicated to each other, in the winter of 1814, and prior to the registry of the elder mortgage. The subsequent registry by

[1] "Then the rule in equity is, *qui prior tempore potior jure;* and as all the defendants as well as the plaintiffs have but an equity, that general rule must prevail with this distinction (which yet will conclude in favor of the plaintiffs) that it holds only where none of the parties have a better right to call for the legal estate than the others; for there are cases, where it is held, that they who have such a right shall be preferred. In *Brace* v. *Duchess of Marlborough,* 2 *Will.* 495, the general rule only is laid down without entering into any exception or particularity therefrom. But in another case in *Vern.* such exception appears."—*Lord Hardwicke* in *Earl of Pomfret* v. *Lord Windsor* (1752) 2 *Ves. Sr.* 472, 486.

[2] *S. C.* 2 *Eq. Ca. Abr.* 606.

[3] "And therefore among the males the elder brother and his posterity shall

the plaintiffs was of no avail. The rights of the parties had become *fixed,* by means of the *notice,* previously, mutually and concurrently given, and which notice, as to them, answered all the purpose and object of a registry. Priority of registry never prevails over a previous notice of an unregistered mortgage. (10 *Johns. Rep.* 461, 2.) In considering this case, then, I shall place entirely out of view the fact of the registry. The real point in the case is, which of the unregistered mortgages had the preference in equity, when the information of their existence was given and received.

If there be several equitable interests affecting the same estate, they will, if the equities are otherwise equal, attach upon it, according to the periods at which they commenced; for it is a maxim of equity, as well as of law, that *qui prior est tempore potior est jure.* This rule has been repeatedly declared; (*Clarke* v. *Abbott,* 2 *Eq. Cas. Abr.* 606 pl. 41. *Bristol* v. *Hungerford,* 2 *Vern.* 525. *Symmes* v. *Symonds,* 1 *Bro. P. C.* 66. *Brace* v. *Marlborough,* 2 *P. Wms.* 492, 495.) and we are to see if there be anything in this case to prevent the application of it.

There is no fraud charged or proved upon the plaintiffs, and if they are to be postponed, notwithstanding they have the elder mortgage, it must be on the ground of culpable negligence, either in leaving the lease with the mortgagor, when they took the mortgage of his term, or in not causing their mortgage to be seasonably registered. I feel strongly disposed to give to these circumstances all the weight to which they can be entitled.

1. It is understood to have been the old rule in the *English* chancery, that if a person took a mortgage, and voluntarily left the title deeds with the mortgagor, he was to be postponed to a subsequent mortgagee, without notice, and who was in possession of the title deeds. The reason of the rule was, that, by leaving the title deeds, he enabled the mortgagor to impose upon others who have no registry to resort to, except in the counties of *Yorkshire* and *Middlesex,* and who, therefore, can only look for their security to the title deeds, and the possession of the mortgagor. The rule was so understood and declared, by Mr. Justice *Burnet,* in *Ryall* v. *Rowles,* (1 *Atk.* 168, 172. 1 *Vesey,* 360.) and by Mr. Justice *Buller,* in *Goodtitle* v. *Morgan,* (1 *Term Rep.* 762.) and there are decisions which have given great weight to the circumstance of the title deeds being in possession of the junior mortgagee. Thus, in *Head* v. *Edgarton,* (3 *P. Wms.* 279.) the lord chancellor said, it was hard enough upon a subsequent mortgagee, that he had lent his money upon lands subject to a prior mortgage, without notice of it, and, therefore, he could not add to his hardship, by taking away from him the title deeds,

inherit lands in fee simple as heirs before any younger brother, or any descending from him, because (as *Littleton* saith) he is *pluis digne de sanke. Quod prius est dignius est,* and *qui prior est tempore potior est jure. Si quis plures filios habuerit, jus proprietatis primo descendit ad primo genitum, eo quod inventus est primo in rerum natura.*" Co. Litt. 14 a.

and giving them to the elder mortgagee, unless the first mortgagee paid him his money; especially as the first mortgagee, by leaving the title deeds with the mortgagor, had been, in some measure, accessory in drawing in the defendant to lend him money. This case, however, so far from establishing what was supposed to be the old rule of equity, evidently contradicts it, and admits the better title in the first mortgagee. So, in case of *Stanhope* v. *Verney,* before Lord *Northington, (Butler's note to Co. Litt.* 290. 296. § 13.) the second mortgagee, without notice, had possession of the title deeds, but the chancellor did not give him the preference on that single circumstance, but because he also had got possession of an outstanding term. There does not seem, therefore, to be the requisite evidence of the existence of any such rule in equity, as has been stated by some of the judges; and if there was, a different rule has been since established. It is now the settled *English* doctrine, that the mere circumstance of leaving the title deeds with the mortgagor, is not, *of itself,* sufficient to postpone the first mortgagee, and to give the preference to a second mortgagee, who takes the title deeds with his mortgage, and without notice of the prior encumbrance. There must be fraud, or gross negligence, which amounts to it, to defeat the prior mortgage. There must be something like a voluntary, distinct, and unjustifiable *concurrence,* on the part of the first mortgagee, to the mortgagor's retaining the title deeds, before he shall be postponed. Lord *Thurlow,* in *Tourle* v. *Rand,* (2 *Bro.* 650.) said, he did not conceive of any other rule by which the first mortgagee was to be postponed, but fraud or gross negligence, and that the mere fact of not taking the title deeds was not sufficient; and that if there were any cases to the contrary, he wished they had been named. So the rule was also understood by Chief Baron *Eyre,* in *Thumb* v. *Fluitt,* (2 *Anst.* 432.) and has since been repeatedly recognized. (Lord *Eldon,* in 6 *Vesey,* 183. 190. Sir *William Grant,* in 12 *Vesey,* 130. 1 *Fonb.* 153. 155. note.) It is admitted, by these same high authorities, to be just, that the mortgagee, who leaves the title deeds with the mortgagor, so as to enable him to commit a fraud, by holding himself out as absolute owner, should be postponed: but the established doctrine is, that nothing but fraud, express or implied, will postpone him.

PHILLIPS *v.* PHILLIPS (1861) 4 *De G. F.* & *J.* 208, 215.—The LORD CHANCELLOR [WESTBURY]. * * * I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding), makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz., the estate subject to the mortgage or

annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, "Qui prior est tempore potior est jure." The first grantee is potior—that is, potentior. He has a better and superior —because a prior—equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers at the time when they took their securities and paid their money had notice of the first incumbrance or not. These elementary rules are recognized in the case of *Brace* v. *Duchess of Marlborough*, 2 *P. Wms.* 491, and they are further illustrated by the familiar doctrine of the Court as to tacking securities. It is well known that if there are three incumbrancers, and the third incumbrancer, at the time of his incumrance and payment of his money, had no notice of the second incumbrance, then, if the first mortgagee or incumbrancer has the legal estate, and the third pays him off, and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage which he has acquired, and to exclude the intermediate incumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title, for if the first mortgagee has not the legal title, the third does not by the transfer obtain the legal title, and the third mortgagee by payment off of the first acquires no priority over the second.

RICE *v.* RICE.

IN CHANCERY, BEFORE SIR RICHARD TORIN KINDERSLEY, V. C., 1853.[1]

[2 *Drewry* 73.]

This was the hearing of the cause on a motion for a decree. *Michael Rice*, the first Defendant, purchased from *George Rice*, *E. Moore* and his wife, *Lydia Rice* and *W. Nail* and his wife, certain leasehold property. On the execution of the assignment *E. Moore* received his share of the purchase-money; but no money was received by the other vendors, who allowed the payment to stand over for a few days on the promise of the purchaser then to pay. However, the assignment recited the payment of the whole purchase-money, and the usual receipt was endorsed on it, and the other title deeds were delivered up to the purchaser.

The day following the execution of the deed, *Michael Rice* deposited

[1] The principal case will, it is hoped, confirm the following statement: "He was not a politician, and was recommended only by his deep learning and sound judgment." Dictionary Biography, Article, Kindersley.

the assignment and title deeds with the Defendants *Ede* and *Knight*, with a memorandum of deposit, to secure an advance. *Rice* then absconded, without paying either the vendors or the equitable mortgagees.

These were the principal facts of the case. The other material circumstances will be found stated in the judgment. The bill was for payment of the purchase-money, or for sale of the premises; and it being admitted that there was not enough to pay both the vendors and the equitable mortgagees, the question in the cause was, which ought to have priority, the vendors or the equitable mortgagees.

The VICE CHANCELLOR took time to consider, and on the 12th January delivered the following judgment:—

The question to be decided in this case is, whether the equitable interest of the Plaintiffs in respect of the vendor's lien for unpaid purchase money, is to be preferred to the equitable interest of the Defendant *Ede* as equitable mortgagee.

What is a rule of a Court of Equity for determining the preference as between persons having adverse equitable interests? The rule is sometimes expressed in this form:—"As between persons having only equitable interests, *qui prior est tempore potior est jure.*" This is an incorrect statement of the rule; for that proposition is far from being universally true. In fact not only is it not universally true as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal; as in the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees, where the second assignee has given notice, and the first has omitted it.

Another form of stating the rule is this:—"As between persons having only equitable interests, if their equities are equal, *qui prior est tempore potior est jure.*" This form of stating the rule is not so obviously incorrect as the former. And yet even this enunciation of the rule (when accurately considered) seems to me to involve a contradiction. For when we talk of two persons having equal or unequal equities, in what sense do we use the term "equity"? For example, when we say that A. has a better equity than B., what is meant by that? It means only that according to those principles of right and justice which a Court of Equity recognizes and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B. And therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which a Court of Equity would altogether refuse to lend its assistance to either party as against the other. If the Court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of time, how can it be said that the equities of the two are equal; i. e., in other words, how can it be said that the one has no better right to call for the interference of a Court of Equity than the other? To lay down the rule therefore with

perfect accuracy, I think it should be stated in some such form as this:— "As between persons having only equitable interests, if their equities are *in all other respects* equal, priority of time gives the better equity; or, *qui prior est tempore potior est jure.*"

I have made these observations, not of course for the purpose of a mere verbal criticism on the enunciation of a rule, but in order to ascertain and illustrate the real meaning of the rule itself. And I think the meaning is this: that in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; i. e. that a Court of Equity will not prefer the one to the other, on the mere ground of priority of time, until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or in other words that their equities are in all other respects equal; and that if the one has on other grounds a better equity than the other, priority of time is immaterial.

In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the Court must direct its attention are obviously these: the nature and condition of their respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto. And in examining into these points, it must apply the test, not of any technical rule or any rule of partial application, but the same broad principles of right and justice which a Court of Equity applies universally in deciding upon contested rights.

Now in the present case each of the parties in controversy has nothing but an equitable interest; the Plaintiffs' interest being a vendor's lien for unpaid purchase money, and the Defendant *Ede* having an equitable mortgage. Looking at these two species of equitable interests abstractedly, and without reference to priority of time, or possession of the title deeds, or any other special circumstances, is there anything in their respective natures or qualities which would lead to the conclusion that in natural justice the one is better, or more worthy, or more entitled to protection than the other?

Each of the two equitable interests arises out of the forbearance by the party of money due to him. There is, however, this difference between them, that the vendor's lien for unpaid purchase-money is a right created by a rule of Equity, without any special contract; the right of the equitable mortgagee is created by the special contract of the parties. I cannot say that in my opinion this constitutes any sufficient ground of preference; though if it makes any difference at all, I should say it is rather in favour of the equitable mortgagee, inasmuch as there is no *constat* of the right of the vendor to his lien for unpaid purchase-money until it has been declared by a decree of a Court of Equity; whereas there is a clear *constat* of the equitable mortgagee's title immediately on the contract being made. But I do not see in this any sufficient grounds for holding that the equitable mortgagee has the

better equity. So far, then, as relates to the nature and quality of the two equitable interests abstractedly considered, they seem to me to stand on an equal footing; and this I conceive to have been the ground of Lord *Eldon's* decision in *Mackreth* v. *Symmons,* 15 Ves. 329, where, in a contest between the vendor's lien for unpaid purchase-money and the right of a person who had subsequently obtained from the purchasers a mere contract for a mortgage, and nothing more, he decided in favour of the former, as being prior in point of time.

If, then, the vendor's lien for unpaid purchase-money, and the right of an equitable mortgagee, by mere contract for a mortgage, are equitable interests of equal worth in respect of their abstract nature and quality, is there any thing in the special circumstances of the present case to give to the one a better equity than the other?

One special circumstance that occurs is this, that the equitable mortgagee has the possession of the title deeds. The question therefore arises, —Between two persons having equitable interests of equal worth, does the possession of the title deeds by one of them give him the better equity? In *Foster* v. *Blackstone,* 1 Myl. & K. 307, Sir *John Leach,* M. R., says,—"A declaration of trust of an outstanding term, accompanied by a delivery of the deeds creating and continuing the term, gives a better equity than a mere declaration of trust to a prior incumbrancer." That is a case in which the two parties have equitable interests in the term of precisely the same nature, viz., a declaration of trust of the term without an actual assignment; and there the delivery of the deeds to the subsequent incumbrancer gives him the better equity. To the same effect is the decision in *Stanhope* v. *Lord Verney,* according to Lord *St. Leonards'* view of it, as reported in *Butler's Co. Litt.,* Page 290 b, note (1) sect. 15, (which seems a more satisfactory report than that in 2 *Eden,* Page 81. Lord *St. Leonards,* 3 Sugd. Vend. 218, states it thus:—"In *Stanhope v. Earl Verney,* Lord *Northington* held that a declaration of trust of a term in favour of a person was tantamount to an actual assignment, unless a subsequent incumbrancer, *bonâ fide* and without notice, procured an assignment; and that the custody of the deeds respecting the term, with the declaration of the trust of it in favour of a second incumbrancer, was equivalent to an actual assignment of it, and therefore gave him an advantage over the first incumbrancer which equity could not take from him." The same doctrine appears to be recognized by Lord *Eldon* in *Maundrell* v. *M.,* 10 Ves. 271, where he says, "It is clear, with regard to mortgagees and incumbrancers, that if they do not get in the satisfied term in some sense, either taking an assignment, making the trustee a party to the instrument or *taking possession of the deed creating the term,* that term cannot be used to protect them against any person having mesne charges or incumbrances;" implying that taking possession of the deed creating the term would confer on a subsequent incumbrancer such right of protection by means of the term. We have here, then, ample authority for

the proposition, or rule of equity, that as between two persons whose equitable interests are of precisely the same nature and quality, and in that respect precisely equal, the possession of the deeds gives the better equity. And, applying this rule to the present case, it appears to me that the equitable interests of the two parties being in their nature and quality of equal worth, the Defendant having possession of the deeds has the better equity; and that there is, therefore, in this case no room for the application of the maxim *qui prior est tempore potior est jure,* which is only applicable where the equities of the two parties are in all other respects equal. I feel all the more confidence in arriving at this conclusion, inasmuch as it is in accordance with the opinion expressed by Lord *St. Leonards* in his work on Vendors and Purchasers. And I have no doubt that in *Mackreth* v. *Symmons,* if the equitable mortgagee had, in addition to his contract for a mortgage, obtained the title deeds from his mortgagor, Lord *Eldon* would have decided in his favour.

I must however guard against the supposition that I mean to express an opinion that the possession of title deeds will in all cases and under all circumstances give the better equity. The deeds may be in the possession of a party in such a manner and under such circumstances as that such possession will confer no advantage whatever. For example, in *Allen* v. *Knight*, 5 Hare, 272, (affirmed by the Lord Chancellor and reported on appeal in 11 Jur., Page 527), the deeds had been delivered to the first equitable mortgagee, and by some unexplained means they had got back into the possession of the mortgagor, who delivered them to a subsequent equitable mortgagee. It was insisted by the latter that it must be presumed that it was by the fault or neglect of the first mortgagee that the deeds had got out of his possession, or that at all events the Court should direct an enquiry as to the circumstances. But the Court held that the onus lay on the second mortgagee of proving such alleged fault or neglect of the first mortgagee; and as he had failed to prove it, the Court could not presume it, nor direct an enquiry on the subject; and decreed in favour of the first mortgagee. I think it may be clearly inferred from this case that if the first mortgagee had never had the deeds delivered to him, or if it had been proved that the deeds had got back to the mortgagor through his fault or neglect, the decision would have been in favour of the second mortgagee who had the deeds. So the deeds may have come into the hands of a subsequent equitable mortgagee by means of an act committed by another person which constituted a breach of an express trust as against the person having the prior equitable interest. In such a case it would be contrary to the principles of a Court of Equity to allow the subsequent mortgagee to avail himself of the injury which had been thus done to the party having the prior equitable estate or interest.

Indeed it appears to me that in all cases of contest between persons having equitable interests, the conduct of the parties and all the cir-

cumstances must be taken into consideration, in order to determine which has the better equity. And if we take that course in the present case, everything seems in favour of the Defendant the equitable mortgagee. The vendors when they sold the estate chose to leave part of the purchase money unpaid, and yet executed and delivered to the purchaser a conveyance, by which they declared in the most solemn and deliberate manner, both in the body and by receipt indorsed, that the whole purchase money had been duly paid. They might still have required that the title deeds should remain in their custody, with a memorandum by way of equitable mortgage as a security for the unpaid purchase money, and if they had done so they would have been secure against any subsequent equitable incumbrance; but that they did not choose to do, and the deeds were delivered to the purchaser. Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity. In truth it cannot be said that the purchaser in mortgaging the estate by the deposit of the deeds has done the vendors any wrong, for he has only done that which the vendors authorized and enabled him to do. The Defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had in effect by their acts assured the mortgagee that, as far as they (the vendors) were concerned, the mortgagor had an absolute indefeasible title both at law and in equity.

The mortgagee was guilty of no negligence; he was perfectly justified in trusting to the security of the equitable mortgage by deposit of the deeds, without the slightest obligation to go and inquire of the vendors whether they had received all their purchase money, when they had already given their solemn assurance in writing that they had received every shilling of it, and had conveyed the estate and delivered over the deeds; and I do not think that the fact of the conveyance bearing date only the day before the mortgage imposed on him any such obligation. The Defendant omitted nothing that was necessary to constitute a complete and effectual equitable mortgage; and although the mortgage was taken, not for money actually advanced at the time, but for an antecedent debt, the forbearance of that debt constitutes a full and sufficient valuable consideration.

Upon a comparison then of the conduct of the two parties and a consideration of all the circumstances of the case, and especially the fact of the possession of the deeds, which the mortgagee acquired with perfect *bona fides*, and without any wrong done to the vendors, I am of opinion that the equity of the mortgagee is far better than that of the vendor, and ought to prevail.

I may in conclusion venture to make the suggestion, that the point now under consideration is often put by text writers in a form calculated to mislead, when it is propounded as a question whether the

vendor, in respect of his lien for unpaid purchase money, or an equitable mortgagee, ought to be preferred; or when an opinion is expressed that the one or the other has the better equity. If I am right in my view of the matter, neither the one nor the other has *necessarily* and *under all circumstances* the better equity. Their equitable interests, abstractedly considered, are of equal value in respect of their nature and quality; but whether their equities are in other respects equal, or whether the one or the other has acquired the better equity, must depend upon all the circumstances of each particular case, and especially the conduct of the respective parties. And among the circumstances which may give to the one the better equity, the possession of the title deeds is a very material one. But if after a close examination of all these matters, there appears nothing to give to the one a better equity than the other, then, and then only, resort must be had to the maxim *qui prior est tempore potior est jure,* and priority of time then gives the better equity.

J.—Where the Equities are Equal the Legal Title Prevails.

BASSET *v.* NOSWORTHY.

In Chancery, before Lord Keeper Finch, 1673.

[*Reports Temp. Finch* 102.][1]

The Plaintiff, Sir *William Basset,* intitled himself, *as Son and Heir of Elizabeth Seymour,* who was the only *Daughter and Heir of Sir Joseph Killegrew,* who was Brother and Heir of Sir *Henry Killegrew,* whose Estate the Lands in the Bill mentioned formerly were; the Defendant's Title being under a pretended Purchase (as the Plaintiff alledged) of these Lands at *Drury-house,* and under the Will of *Sir Henry Killigrew,* the Purchase being from *Jane Davis,* afterwards the Wife of Mr. *Berkley,* and from *Henry Hill,* the pretended natural Son of the said Sir *Henry Killigrew,* of which Will the Plaintiff alledged there was a *Revocation* by some subsequent Deed or Will; and for a Discovery thereof, and what Mr. *Nosworthy* really paid for the Purchase, and what Deeds and Writings he had, and to set aside the Incumbrances which he had bought to protect his Purchase, and that Mrs. *Seymour* might try her Title at Law upon the supposed *Revocation* against the

[1] *S. C.* 2 *White and Tudor's Leading Cases in Equity pt.* 1, 1, *with notes.*

Title of the Defendant, as a Purchaser under the said Will, the now Plaintiffs exhibited this Bill:

To which the Defendant pleaded a *Dismission* of a Bill in the Court of *Exchequer* signed and inrolled, which Bill was there brought for the same Matter as in this Bill, and fully examined and dismissed upon a full Hearing, but without *Prejudice,* and the Dismission duly signed and inrolled; and he farther pleaded, that he was a Purchaser for a valuable Consideration, *bona fide,* paid without Notice of any Revocation.

This Cause being heard by the *Lord Keeper Bridgman,* he ordered Precedents to be searched, where a Plaintiff, after a Dismission of his Bill on a judicial and formal Hearing, and a full Examination of Witnesses in one Court of Equity, (*and that without Prejudice*) had ever been admitted in another Court of Equity, to examine new Witnesses to the same Matter formerly in Issue and examined.

And afterwards there being several Orders made in this Cause, and one by which the Plea was over-ruled; and now the Cause coming to be heard by the *Lord Keeper Nottingham,* who having read the Articles for the Defendant's Purchase, and the *Conveyances, Leases, Fine* and *Recovery,* which appeared to be made before any Purchase at *Drury-house,* and having considered the whole Matter, he was of Opinion, that the Court had gone much out of the Way, and that the Cause had been perplexed with several *extraordinary Orders,* and not according to the usual Course of Proceedings; and therefore it was to be brought back to that State where it first went wrong.

Whereupon he discharged all former Orders for examining Witnesses at large, and confirmed all Examinations to the Matter of the Defendant's Plea, which, by the Justice of a Court of Equity, ought to conclude the Plaintiff, unless he could disprove it; and a Bill of the same Nature having been brought in the *Court of Exchequer,* and there, after a full Examination, dismissed, it seemed very hard that the Dismission *was without Prejudice,* because no *cross Bill* can or ought to be received *after Publication,* to examine the same Witnesses again, for that might be a Means to introduce Subornation and Perjury, even by the Order of this Court, and no Precedents can be found to warrant such Practice.

Therefore the Defendant having pleaded this *Dismission* in Bar of any farther Examination, and that he is a Purchaser, *bona fide,* without Notice of any *Revocation,* and afterwards for the Court to save the Benefit of this Plea, by Way of Answer, and yet to allow an Examination to the whole Matter, which had been pleaded, in Bar to such examination, (all of which had formerly been done in this Cause) was in Effect to surprise the Defendant, and unawares to draw him off from that which was his most material Defence.

The Cause being then set right before the Court upon the true Merits thereof, there were only two Points which were considerable.

1. What the Law of this Court is concerning *Purchasers.*
2. Whether the Defendant was a *Purchaser* within that Law.

As to the first Point, a Purchaser, *bona fide,* without Notice of any Defect in his Title at the Time of the Purchase made, may lawfully buy in a *Statute or Mortgage,* or any other Incumbrance; and if he can defend himself at Law by any such Incumbrances bought in, his Adversary shall never be aided in a Court of Equity by setting aside such Incumbrances; for Equity will not disarm a *Purchaser,* but assist him; and Precedents of this Nature are very ancient and numerous, (*viz.*) where the Court hath refused to give any Assistance against a purchaser either to an *Heir,* or to a *Widow,* or to the *Fatherless,* or to *Creditors,* or even to one Purchaser against another.

And this Rule, in a Court of Equity, is agreeable to the Wisdom of the Common Law, where the Maxims which refer to *Descents, Discontinuances, Nonclaims, and to collateral Warranties,* are only the wise Arts and Intentions of the Law to protect the Possession, and to strengthen the Rights of *Purchasers.*

2. As to the second Point the Court declared, that the Defendant had sufficiently proved his *Plea,* and himself to be a Purchaser within the Protection of this Court, because no Fraud or Circumvention appeared; and it was evident, that the Defendant had paid several great Sums to discharge *Statutes,* which incumbered those Lands, over and above what was paid to Mrs. *Jane Berkley* for her Estate for Life, and to *Henry Hill* for his *Reversion;* and tho' the Lands were proved to be of much greater Value at this Time, by the falling of several Lives, than what they were at the Time of the Purchase, yet that will not alter the Case in Equity, because in Purchases the Question is not, whether the *Consideration be adequate, but whether 'tis valuable;* for if it be such a Consideration as will make the Defendant a Purchaser within the Statute 21 *Eliz.* and bring him within the Protection of that Law, he ought not to be impeached in Equity.

And since *Henry Hill* had nothing to subsist on during his Minority but this *Reversion,* and being a *Bastard* could have no Kindred by the Law, and probably but few Friends, there was some Hazard of the Money, which was advanced during his Minority, if he died before the *Fine* and *Recovery* suffered.

Therefore the Court allowed the *Plea* and dismissed the Bill, and suppressed all the Depositions taken in this Cause before *April* last, and all since, but only such which relate to this Plea of the Defendant.

SHERLY *v.* FAGG.

IN CHANCERY, BEFORE LORD CHANCELLOR CLARENDON, 1665.[1]

[1 *Cases in Chancery* 68.][2]

The plaintiff by his bill made title to the lands in question by an entail of his great-grandfather, 9 Jac. whereby the premises were limited to the great-grandfather for life, remainder to the plaintiff's grandfather by name for life, remainder to the plaintiff's father by name for life, remainder to the first son (which the plaintiff is) and other sons in tail, and shows both by virtue of those limitations the great-grandfather, grandfather and father did enjoy during their respective lives, and the plaintiff's father died about ten years since, the plaintiff then an infant of ten years old; and that the plaintiff ought to enjoy by that settlement. And the bill complained that Sir John Fagg and the rest of the defendants had entered into several parts of the premises, and did divide the same among them, having gotten the evidence and the settlement, and did conceal the same; which the said Sir John had gotten into his hands from one Walter, for a reward to him, or otherwise; and he had altered and confounded the bounds and names of the land; and so to have a discovery of evidences, and the deed of settlement, and delivery up of the same, was the scope of the bill.

The defendant Fagg pleaded, that for 6870 *l.* really paid to the Earl of Thanet, he purchased the premises of him by good conveyance at law; and demands judgment, whether he shall further discover his title, or any deeds or evidences to weaken it? and upon long debate, after a case stated, the whole court was of opinion that the plea was good.[3]

[1] Chief Justice Bridgman and Judge Archer sat with his lordship.

[2] *S. C.* 1 *Eq. Ca. Ab.* 354, *pl.* 1.

[3] The manner in which the defendant, good Sir John, secured his legal title was later related by Lord Chancellor NOTTINGHAM as follows: "Put them in mind of Sir *John Fagg's* case, which the defendant's counsel could not remember to urge, where he being a purchaser came into a man's study, and there laid hands on a statute, that would have fallen on his estate and put it in his pocket; and in that case, he having thereby obtained an advantage in law, though so unfairly and by so ill a practice, the court would not take that advantage from him." *Huntington* v. *Greenville* (1682) 1 *Vern.* 49, 51.

"And *Culpepper's* case was cited, where a man had bought gavelkind land of the eldest son, and paid his purchase money, without knowledge that it was gavelkind, and afterwards for a song bought in the titles of the younger brothers, who were ignorant of their titles, yet could not be relieved afterwards in this court: the purchaser having honestly paid his money without notice, may use what means he can to justify his title."—*Sanders* v. *Deligne & Barns* (1692) *Freeman's Ch.* 123, 124.

EDMUNDS *v.* POVEY.

In Chancery, before Lord Keeper North, 1683.

[1 *Vernon* 187.]

The principal question in this case was touching the buying in of incumbrances, viz. where there are first, second, and third mortgagees, who had all lent their money without notice. The third mortgagee hearing of the two former securities buys in the first incumbrance, to wit, a judgment that was satisfied: and it was strongly insisted at the bar, that though this trade of buying in incumbrances had been formerly countenanced here, yet that it was in truth a thing against conscience, and contradictory to many established rules of law and equity.

But after long debate the *Lord Keeper* told them, he wondered the counsel laid their shoulders to a point, that had been so long since settled, and received as the constant course of *Chancery*. It is true, there have been strong arguments used against the unreasonableness of this practice, and there might be likewise strong reasons brought for the maintaining of it, and so was at first a case very disputable; but being once solemnly settled, as it was in the case of *Marsh* and *Lee*, 1 Ch. Ca. 162,[1] Vide *Brace* v. *Duchess of Marlborough*, 2 *P. Wms.* 491, and cases cited in note there, he would not now suffer that point to be stirred.

The counsel in their own justification replied, that his *Lordship*, when this cause came first before him, had referred it to Sir *Adam Ottley*, to state the case specially, and it now came before him on the master's report, and there was no other point in the case but this; and therefore they supposed his lordship intended they should be at liberty to speak to that matter.

But his lordship declared, he would not change the rule, that had so long prevailed, in this case; but it may be, he might do so, where he found a man designing a fraud, and thought to make a trade of cozening by the rules of the court.

Serjeant *Pemberton* moved, that as to the point of notice he supposed his lordship meant, that a man that buys in a prior incumbrance, must do it without notice of the middle incumbrance, not only when he lent his money, but also at the time when he bought in the prior incumbrance. *Sed. non allocatur.*[2]

[1] The report of this case contains the pleadings and the points raised by both plaintiff and defendant. At the end of the case, the reporter has collected a great many early cases on the questions at issue.

[2] For a collection of the early cases involving this principle, see *Francis, Maxims of Equity* 61 *et seq.*

HAWKINS *v.* TAYLOR AND LEIGH.

IN CHANCERY, BEFORE LORD JEFFERYS, 1687.

[2 *Vernon* 29.]

The defendant *Leigh* having an incumbrance on the lands in question subsequent to the plaintiff's and the bill being against him and other incumbrances, to discover their incumbrances, *Wilson,* who was a defendant, and had the first incumbrance, assigned to *Leigh, pendente lite:* and the question at the hearing was, whether the defendant *Leigh,* who had a mortgage subsequent to the plaintiff's should help himself against the plaintiff, by buying in *Wilson's* incumbrance, that was prior to both.

The Lord *Chancellor* conceived, he might lawfully do so; and dismissed the plaintiff's bill without costs.[1]

CARTER *v.* CARTER (1857), 3 *Kay & John.* 617, 636.—VICE-CHANCELLOR SIR W. PAGE WOOD:—* * * Holding, therefore, as I do, that the whole of that interest passed, and that *James Prosser* by the surrender and admittance acquired the legal estate in fee in one eighth part of the copyholds to which he was so admitted, the really serious question, which was extremely ably argued by Mr. *James* is this:—What ought

[1] Prior satisfied claims will protect a subsequent purchaser. *Stanton* v. *Saddler* (1687) 2 *Vern.* 30 (a satisfied statute); *Turner* v. *Richmond* (1688) 2 *Vern.* 81 (a satisfied mortgage).

"As to the second point Lord *Rawlinson* was of opinion, that *Sedgwick* as an innocent purchaser, ought to have the advantage of all his securities to defend himself at law, and that this court ought not to take any advantage from him; and said he would consider the several steps that this court had gone in favour of purchasers, in allowing them to defend themselves by any advantage they could get at law; that where a purchaser buys in an old statute or mortgage, though nothing be due upon it, he shall be admitted to defend himself by it, as was the case of *Higden* and *Calamy,* 21 Car. 2, and the case of *Wymonsel* and *Hawland, May* 1674, and many cases of that kind. The next step has been that purchasers who have got an advantage at law, though by undue means, have been permitted to profit by it. And for that purpose cited the cases of *Burnel* and *Ellis,* where Ellis had got the deed of rent-charge into his hands: and 22 *Car.* 2. *Sir John Fagg's* case, who got the deed of entail into his hands by a trick: and the case of *Harcourt* and *Knowel,* where a release was obtained from a grantee of a rent charge, without any consideration and by fraud, and yet a purchaser admitted to take the advantage of it; and the case of Lord *Huntington* and *Greenville,* first decreed to protect a purchaser, and after that a release gained from an administrator *de bonis non:* and the case of *Seybourne* and *Clifton* where plaintiff and de-

to be the result of his thus obtaining the legal estate accidentally (if I may so term it), and certainly without notice in point of fact of the trusts upon which the legal estate was held.

In considering this question, I have had occasion to look through the whole class of authorities with reference to the protection which this Court affords to purchasers without notice. The cases have gone to a very considerable length unquestionably—the earlier cases, perhaps, to a greater length than would be supported by more modern decisions. One of the earlier cases is cited in *Vernon* as *Sir John Fagg's case,* 1 Vern. 52, 53, and is reported in 1st Chancery Cases, under the name of *Sherly* v. *Fagg,* 1 Chanc. Cas. 68. Compare 2 Vern. 701, n. 2, but without the circumstances, mentioned in the narrative of the case in *Vernon,* of the actual fraud which appears to have existed, and according to which the case is an authority to the full extent, that even an advantage in law, he was protected in the possession of that deed. The would be supported in order to maintain his title. *Vernon* in narrating the case, states that *Sir John Fagg,* being a purchaser, came into a man's study, and there laid hands on a statute that would have fallen on his estate, and put it up in his pocket—evidently without any authority—in fact stole it, and nevertheless, having thereby obtained an advantage in law, he was protected in the possession of that deed. The facts, as to how he obtained possession of the deed, do not appear as the case is narrated in the more full report in 1st Chancery Cases, and I should apprehend it is sufficiently clear, that a case to such an extent as that would never be upheld.

There are several cases in *Vernon* which go very far—cases some of which are reported, while others are merely referred to in the course of the discussion. In one, there was clearly no title existing at all, as the law then regarded it, the title being merely a parliamentary title during the usurpation. Nevertheless, the purchaser was held to be protected; having got the legal estate, he was not interfered with by this Court. There are other cases of that description.

An early case occurs in *Viner,* which shews the great length to which the doctrine has been carried. It is that of *Turner* v. *Buck,* 22 Vin. Abr. 21, argued by Sir *Joseph Jekyll,* before Lord *Cowper.* The case is narrated very shortly. The Defendant had purchased of a person who in effect was held to be in possession as a mere disseisor. He had taken a conveyance without notice of any other title; and afterwards, the disseisee being a trustee, the cestui que trust applied to this Court

fendant had each of them purchased a reversion, expectant on the death of tenant for life, the plaintiff's bill was that he might examine his witnesses to preserve their testimony, and be admitted to try his title in the life time of the tenant for life; but forasmuch as the purchaser was a defendant, the court would do nothing in it, but dismissed the plaintiff's bill, and he lost his land for want of examining his witnesses."—*Hitchcock* v. *Sedgwick* (1690) 2 *Vern.* 156, 158.

to compel the disseisee, his trustee, either to convey to him the legal estate—probably it would have been difficult to compel a conveyance in consequence of its being turned to a mere right of entry—or to proceed in ejectment to recover the estate, or to allow him, the cestui que trust, to proceed in his name. The Court refused to make the decree. The Defendant being a purchaser without notice, the Court said it would not give relief against him by compelling the disseisee to take any of the steps in question. That case has gone as far as any I can find determined.

There are numerous cases in which persons, purchasers for value, and getting possession of the deeds in a legitimate manner, have been held protected. *Wallwyn* v. *Lee*, 9 Ves. 24, was a case of that kind. There, a mortgage had been created by the settlor, who was simply a tenant for life under the settlement, and after his death the tenant in tail in possession applied to this Court for a discovery and delivery of the title deeds, which, he insisted, must be regarded as unduly in the possession of the mortgagee, he having no interest in the estate. But Lord *Eldon*, after considerable deliberation, held that the Court would not interfere to that extent, that the mortgagee was to be protected in the advantage he had gained by obtaining possession of the deeds, and that no course could be taken against him, inasmuch as he was a purchaser for valuable consideration without notice.

A case was cited before in argument, where a good many of the decisions I have mentioned may be found. The case of *Jones* v. *Powles*, 3 Myl. & K. 581, before Sir John Leach, which was a case of the grossest description as regards the vendor. The vendor had forged a will and sold under the forged title. He then found out that there was a satisfied mortgage. The mortgage having been satisfied, the mortgagee was, of course, a trustee for the true owner of the estate. The vendor, who knew he was not owner of the estate, procured the mortgagee to convey to the purchaser; and the purchaser under that instrument, who originally took no estate or interest, was held nevertheless to be entitled to retain the estate. Sir *John Leach* laid it down (and I apprehend that he did not exceed the authorities referred to in that case when he so laid it down,) that a purchaser from a person in possession purchasing without notice of any prior charge or trust, and obtaining a conveyance of the legal estate from the trustee of a satisfied term or the mortgagee of a satisfied mortgage, will always be protected in this Court against a prior incumbrancer or cestui que trust, subject only to one observation which has considerable bearing on the case before me—an observation to be found in Lord *Eldon's* remarks in *Maundrell* v. *Maundrell*, 10 Ves. 246, and repeated by him in *Ex parte Knott*, 11 Ves. 609, and several other cases—which is this, that the party so conveying the legal estate must not have notice of an express prior trust or incumbrance. On looking through the authorities, you find that, where a conveyance is to be obtained from a mortgagee who has become a

constructive trustee by the mortgage being satisfied, or from a trustee of a term to attend on the inheritance, the question who is or is not entitled to the equity of redemption or to the inheritance may be a question that may affect him as to the conveyance he may make; but, at the same time, there is no direct notice afforded by the document in the hands of the trustee or mortgagee of any ulterior trust beyond this, that he is to hold for the persons entitled. In *Maundrell* v. *Maundrell* and again in *Ex parte Knott,* Lord *Eldon* discusses the whole doctrine, to which, he says, he has considerable aversion, and searches with great jealousy into the cases, and he says he has not been able to find a case where a person being a mortgagee without notice of a previous incumbrance, has been held to be entitled to obtain from the trustee of an outstanding legal estate the conveyance of that estate, when the trustee himself had notice of the intervening incumbrance. And I must say, having now examined a great number of authorities, I have not been able to find a case of that discription. I speak of cases where it is a dry trust—not the case of a mortgagee whose mortgage is unsatisfied, but the dry trust of a satisfied mortgage or a satisfied term of years attending on the inheritance, where there is nothing but the trust remaining to be performed. There are several cases where the purchaser has been allowed at the last moment, after payment in full and up to decree, to get in an earlier mortgage; and there is no breach of duty in a person assigning his mortgage to anybody who pays him. Any purchaser is entitled to hold that which, without breach of duty, has been conveyed to him. But the case put by Lord *Eldon* is this:—Could the purchaser insist on any benefit to be derived from that which would be a breach of duty or breach of trust in the trustee? In *Ex parte Knott* he says, "Surely, if the purchaser would be safe,"—if the purchaser would be entitled to hold the estate discharged of the trust,—"the trustee ought to be so." The trustee should be protected in the act which he has committed. 11 Ves. 614. Whether that doctrine will ultimately be held, it is not perhaps important for me, at present, to say; but I must say, on looking through a vast number of volumes of the earlier and later authorities, I have not found any such case as Lord *Eldon* has put—I have not found any case in which a purchaser, obtaining a conveyance of a mere dry trust estate from a trustee of a satisfied term, or from a mortgagee whose mortgage has been satisfied, such trustee or mortgagee having at the time when he made the conveyance notice of an intervening charge or trust, has been held entitled to protect himself from such charge or trust by means of the legal estate which he has so obtained.

The case at present before me is one of a different character from any case to be found throughout the authorities. Mr. *James* says, there is in substance no difference between the case before me and that of *Jones* v. *Powles,* in which a man having no title whatever, or, what is worse, having himself forged the title, asks the holder of a mortgaged

term, when the mortgage has been satisfied, to convey it to the purchaser, and yet the Court gives the purchaser the benefit of that term, when it is clear the term itself is only held for the benefit of those entitled to the inheritance. But here, the purchaser taking the conveyance under one will, supposed by all parties to be really the last will of the testator, finds himself driven to rely upon another and a second will, containing on the face of it all the trusts which the testator has created. In that point of view, I certainly have found no case analogous to this. The case cited in argument of *Saunders* v. *Dehew*, 2 Vern. 271, is a case of a different description, bearing some resemblance to the case put by Lord *Eldon* in *Maundrell* v. *Maundrell*. In *Saunders* v. *Dehew*, it was held, that, although it had then long been settled, that a second incumbrancer has a right, at any period, however long, after notice of a prior incumbrance, to get in any outstanding estate which can be bonâ fide assigned to him, such as that of a prior mortgagee, whose mortgage he pays off, and who has no notice of the incumbrance; yet he cannot, after notice, take a conveyance of a legal estate held upon express trusts, and then claim to protect himself thereby from the trusts upon which it is so held. It was argued, that, having no notice of those trusts at the time of making the advance, no notice of the instrument creating the trusts, he is a bonâ fide purchaser without notice for valuable consideration,—but finding that there are such trusts, he gets the party who holds the trust estate to hand over that estate to him:—a case very similar to that put by Lord *Eldon*, where the trustee, who has knowledge who is his cestui que trust, makes a title to the purchaser for value. But it was held that a transaction of that kind could not be supported. That stands, however, on different grounds from the case before me, inasmuch as it would be a fraudulent combination of the two—the purchaser and the trustee. The purchaser, to save himself, would be inducing the trustee to commit a fraudulent breach of trust.

The case of *Saunders* v. *Dehew* has been followed in a case of *Allen* v. *Knight*, 5 Hare, 272, before Vice-Chancellor *Wigram*, affirmed on appeal by Lord *Cottenham*, 11 Jurist, 527.

That is the extent of the authorities I have yet found on the subject resulting in this distinction, that although you may get in any outstanding legal estate which a person may bonâ fide assign to you, you having notice of the intervening incumbrance, he not having any such notice, you cannot procure a conveyance from a trustee who himself has an adverse duty to perform, and who by such a conveyance would, in fact, be making over the estate to you to protect you against the very interests which it was his duty to protect. That is so rational, that one wonders the question should have arisen twice.

BRACE *v.* DUCHESS OF MARLBOROUGH.

IN CHANCERY, before SIR JOSEPH JEKYLL, M. R., 1728.

[2 *Peere Williams* 491.]

After a decree which referred it to a Master to state the several incumbrances and their priority, affecting the estate of Sir *William Gostwick,* this case arose: A puisne judgment creditor bought in the first mortgage without notice of the second mortgage when he lent his money on the judgment, and the question was, whether this puisne judgment creditor should tack and unite his judgment to the first mortgage, so as to gain a preference on his judgment before the mesne mortgage? And the *Master of the Rolls* on considering the cases and precedents, held

1*st.* That if a third mortgagee buys in the first mortgage, tho' it be *pendente lite,* pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgage; and this the Lord Chief Justice *Hale* called a *plank* gained by the third mortgagee, or *tabula in naufragio,* which construction is in favour of a purchaser, every mortgage being such *pro tanto.*

2*dly,* If a judgment creditor, or creditor by statute or recognizance, buys in the first mortgage, he shall not tack or unite this to his judgment, &c. and thereby gain a preference; for one cannot call a judgment, &c. creditor, a purchaser, nor has such creditor any right to the lands; he has neither *jus in re,* nor *ad rem,* and therefore, tho' he releases all his right *to the land* he may extend it afterwards. All that he has by the judgment is a lien upon the land, but *nonconstat* whether he ever will make use thereof; for he may recover the debt out of the goods of the cognizor by *fieri facias,* or may take the body, and then during the defendant's life he can have no other execution; besides, the judgment creditor does not lend his money upon the immediate view or contemplation of the cognizor's real estate, for the land afterwards purchased may be extended on the judgment, nor is he deceived or defrauded, tho' the cognizor of the judgment had before made twenty mortgages of all his real estate, whereas a mortgagee is defrauded or deceived if the mortgagor before that time mortgaged his land to another; and 'tis such a fraud as the parliament takes notice of, and punishes by foreclosing such mortgagor who mortgages his land a second time, without giving notice of the first mortgage, and in that respect this case differs from a puisne mortgagee's buying in the first mortgage.

3*dly,* Tho' the rule of equity has been so settled, it is not however

without great appearance of hardship; for still it seems reasonable that each mortgagee should be paid according to his priority, and hard to leave a second mortgagee without remedy, who might know when he lent his money, that the land was of sufficient value to pay the first mortgage, and also his own; to be defeated of a just debt, by a matter *inter alios acta,* a contrivance betwixt the first mortgagee and the third, is great severity; but this has been settled upon solemn debate in a case in 2 *Vent.* 337. *Marsh* versus *Lee,* wherein that great man Sir *Mathew Hale* (then Chief Baron) was called by the Lord Chancellor to his assistance; though this be settled, there can be no reason to carry it farther, to a case not within the same reason, to a case where the lender of the money does not advance it upon the immediate credit of the land; no precedents go so far, being all of them where a puisne mortgagee buys in a first mortgage, not where a puisne creditor by judgment, statute, or recognizance does so, as appears from the case cited of *Marsh* versus *Lee,* reported also in 1 *Chan. Cases* 162. So in 1 *Chan. Cases* 149. *Higgon* & *al'* versus *Syddal, Callamy* & *al'* where *Syddal* seized in fee of land, granted a rent-charge of 300 *l. per annum* for 2000 *l.* to the plaintiff, and afterwards mortgaged the premises for 1200 *l.* to *Callamy,* who bought in a judgment precedent to the grant of the rent-charge, there the mortgagee of the land having no notice of the rent-charge, when he lent his money upon the mortgage, the grantee of the rent-charge was decreed to have no remedy in equity against the judgment, unless he would pay both the mortgage and the judgment; tho' it is to be observed in that case, the judgment creditor, who was the first incumbrancer, could at law extend but a moiety, and out of the remaining moiety the grantee of the rent-charge might distrain for the whole rent; but it seems, that if the first incumbrance had been a statute-staple, and the third mortgagee had bought it in, he should have had the whole land, until at law the cognizor of the statute by a *feire facias ad computandum* had got the statute vacated, and that could only be on payment of the penalty; for equity would not in such case have given any assistance against a third mortgagee without notice, until he was paid his mortgage as well as statute. So note a diversity where a third mortgagee buys in a statute which is the first incumbrance, and where a statute creditor, &c. being the third incumbrancer, buys in the first mortgage; in the latter case the statute or judgment creditor, because he did not lend his money on the credit of the land, shall not unite the first mortgage to his statute or judgment; but in the former, as the land was in the view and contemplation of the lender, he shall be allowed to unite the statute to his third mortgage. So in 1 *Vern.* 187. *Edmunds* versus *Povey,* there was a first, second and third mortgage without notice, and the third mortgagee bought in a judgment prior indeed to all, but it was satisfied, and the first mortgagee bringing his bill to be relieved against this judgment, Lord Keeper *North* would not allow it to be so much as debated, but took it to be settled in the above cited case of *Marsh* versus

Lee, and not then to be disputed; tho' his Lordship admitted that it was at first a very disputable case, and very strong arguments and reasons had been urged on the other side.

4*thly,* If a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee, till both the mortgage, and statute, or judgment be paid; because it is to be presumed that he lent his money upon the statute or judgment, as knowing he had hold of the land by the mortgage, and in confidence ventured a farther sum on a security, which, tho' it past no present interest in the land, yet must be admitted to be a lien thereon.

5*thly,* If a puisne mortgagee without notice buys in a prior judgment or statute, and that judgment, &c. be extended upon an *elegit* at a value much under the real, the mesne mortgagee shall not make the puisne mortgagee, who has got in this judgment, account otherwise, or for more than the extended value; nor will this court give any relief against the judgment or statute, but leave the mesne mortgagee to get rid of them as well as he can at law.

But, 6*thly,* his Honor said, in all these cases it must be intended, that the puisne mortgagee, when he lent his money, had no notice of the second mortgage, statute or judgment, for that was the sole equity; and therefore in the principal case where the creditor by recognizance who bought in the first mortgage, did not in his answer deny notice, tho' such notice was not charged in the bill (which was here brought by some puisne incumbrancers for a sale, and upon bill and answers first a decree to state the several incumbrances, then a report, and thereupon a farther decree was obtained for the Master to state the value of the land mortgaged to each of the mortgagees) yet after all these proceedings for a puisne judgment, &c. creditor, to insist upon his having had no notice, and offering to be examined upon interrogatories was not sufficient; but this denying of notice ought to appear on the pleadings, whereupon the parties might go to issue, and have an opportunity of proving notice; and therefore tho' it were true that a puisne judgment creditor buying in a first mortgage, should in such case unite it to the judgment, (which was clearly otherwise) yet here the puisne judgment creditor came too late, it being a case not to be favoured, and in a cause very much intangled, which, if such indulgencies were to be given to the puisne judgment creditor, would never have an end.

NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE COMPANY *v.* WHIPP.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION, 1884.

[*Law Reports, 26 Chancery Division* 482.][1]

One *Crabtree,* who was manager of the Plaintiff company, executed a legal mortgage of his freehold for £4500 to the company, delivered the title deeds to them, and received the money. The deeds were placed in the company's safe, of which *Crabtree* had a duplicate key. *Crabtree* took the deeds out of the safe, mortgaged the property to Mrs. *Whipp,* who had no notice of the company's mortgage, and handed over the deeds. *Crabtree* went into liquidation. The liquidator commenced, in the name of the company, this action against Mrs. *Whipp* and *Crabtree's* trustee in liquidation, for foreclosure. The trustee disclaiming, the action was dismissed as against him. Mrs. *Whipp* put in a defence and a counterclaim, by which she asked that the securities of the Plaintiff company might be declared fraudulent and void as against her, or in the alternative that they might be postponed to her security, and that the company might be ordered to convey the property to her, subject only to such equity of redemption as it was subject to under her mortgage.

From a judgment postponing its rights, the company appealed.[2]

1884. April 3. The judgment of the Court (*Cotton, Bowen,* and *Fry,* L.JJ.) was now delivered by *Fry,* L.J., who after shortly stating the facts as to the securities in the same terms as above, proceeded as follows:—

The Plaintiffs being possessed of mortgages earlier in date than the mortgage of the Defendant, and, under these instruments, being the owners of the legal estate, are *primâ facie* entitled to priority over the Defendant, but the Defendant seeks to postpone the Plaintiff's legal estate on various grounds.

The main contention on the part of the Defendant, which succeeded in the Court below, was that by reason of the negligent conduct of the Plaintiffs, after they had taken their mortgages, these securities ought to be postponed to the security of the Defendant; and this point has been argued at such length and with so extensive a reference to the authorities, that it appears to us necessary to consider the matter fully.

The question which has thus to be investigated is—What conduct in relation to the title deeds on the part of a mortgagee who has the legal estate, is sufficient to postpone such mortgagee in favour of a subsequent equitable mortgagee who has obtained the title deeds without knowledge of the legal mortgage? The question is not what circumstances

[1] *S. C. Brett's Leading Cases in Modern Equity* 249 *with note.*

[2] The statement of facts is abridged.

may as between two equities give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate. It has been contended on the part of the Plaintiffs that nothing short of fraud will justify the Court in postponing the legal estate. It has been contended by the Defendant that gross negligence is enough.

The cases which assist in answering the question thus raised will be found to fall into two categories—(1), those which relate to the conduct of the legal mortgagee in not obtaining possession of the title deeds; (2), those which relate to the conduct of the legal mortgagee in giving up or not retaining the possession of the title deeds after he has obtained them. The two classes of cases will not be found to differ in the principles by which they are to be governed, but they do differ much in the kind of fraud which is to be most naturally looked for.

In the case of a person taking the legal estate, and not seeking for or obtaining the title deeds from the mortgagor, the question may arise between the legal mortgagee and either a prior or a subsequent incumbrancer or purchaser. But in such transaction the fraud about which the Courts are most solicitous is that which is practised when a man takes the legal estate with knowledge of a prior equitable sale or incumbrance, and yet strives to place himself in a position to show that he took without notice—that kind of fraud which Lord *Hardwicke* explained in *Le Neve* v. *Le Neve, Amb.* 436, 445, when he said:—"The taking of a legal estate after notice of a prior right, makes a person a *malâ fide* purchaser. * * * This is a species of fraud, and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate."

On the other hand, when the legal mortgagee has obtained the possession of the title deeds and subsequently gives them up, no question can arise between him and a prior equitable owner, and no suspicion of the particular fraud which we have referred to can arise; the estate of the legal mortgagee can never be improved by any subsequent dealings with the deeds, and therefore, before the Court can find a fraudulent intent in the legal mortgagee, it must be shewn that he concurred in some project to enable the mortgagor to defraud a subsequent mortgagee, or that he was a party or privy to some other fraud in fact. The kind of fraud most to be looked for in this class of cases is such as was described by the Lord Chancellor, Lord *Cowper,* in the case of the *Thatched House,* when he said, 1 *Eq. Ca. Abr.* 322:—"If a man makes a mortgage and afterwards mortgages the same estate to another, and the first mortgagee is in combination to induce the second mortgagee to lend his money, this fraud will without doubt in equity postpone his own mortgage. So if such mortgagee stands by and sees another lending money on the same estate without giving him notice of his first mortgage, this is such a misprision as shall forfeit his priority."

On the head of law now under consideration the observations of Lord *Eldon* in giving judgment in the case of *Evans* v. *Bicknell*, 6 *Ves.* 174, are without doubt the leading authority. That case is remarkable for several reasons, and not the least so because it is the leading authority on a point which did not naturally arise in it. In that case a settlement had been made on the marriage of *Stansell* and his wife, the defendant *Bicknell* being the trustee of the settlement, and as such having possession of the title deeds. *Bicknell* had delivered the deeds to *Stansell*, and *Stansell* having obtained the deeds mortgaged the property to the plaintiffs and delivered to them the deeds. The plaintiffs alleged that *Bicknell* so delivered the deeds to assist *Stansell* in his fraud. *Bicknell*, on the contrary, alleged and swore that he did it to enable *Stansell* to obtain credit in his trade by shewing that his wife was tenant for life of the property; and the real question for decision was whether *Bicknell* could, on the ground of his alleged participation in *Stansell's* fraud, be made liable for the difference between the value of *Stansell's* life interest under the settlement and the amount of the plaintiff's mortgage. In considering this point the Lord Chancellor was led to discuss the question of postponing the legal estate on the ground of conduct. It is, we think, impossible to read the judgment and not to come to the conclusion that Lord *Eldon* considered that the same fraud and the same kind of negligence which would support a suit for personal relief would justify the postponement of the legal estate, and that nothing less would have that effect. Having referred to the evidence of the principal witness, Lord *Eldon* said, 6 *Ves.* 189: "I still entertain great doubt, whether upon such a transaction a party should be charged personally; for even upon that it amounts to no more than that a trustee delivers the deeds into the hands of a party, who has the settlement. I do not say, it is not negligence; but it is too dangerous upon such loose evidence to hold, that it is that gross negligence, that amounts to evidence of fraud."

The Lord Chancellor then turned to consider a judgment in which Mr. Justice *Buller* had erroneously affirmed that it was an established rule in equity that a second mortgagee who has the title deeds without notice should be preferred, and after adverting to his mistake observed, 6 *Ves.* 190: "The doctrine at last is, that the mere circumstance of parting with the title deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence, that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first mortgagee."

The expression "gross negligence that amounts to evidence of a fraudulent intention" is certainly embarrassing, for negligence is the not doing of something from carelessness and want of thought or attention; whereas a fraudulent intention is a design to commit some fraud, and leads men to do or omit doing a thing not carelessly but for a purpose. But Lord *Eldon* seems to have meant by his words to describe the not

doing of something, so ordinarily done by honest men under the given circumstances, as to be really attributable not to negligence or carelessness, but to a fraudulent intention. In short, it appears to us that in the mouth of Lord *Eldon* the word "negligence" was used simply to express non-feasance.

In a subsequent passage of his judgment the Lord Chancellor varies the form of his language, but without throwing any fresh light on his meaning. In one place, 6 *Ves.* 191, he speaks of "negligence so gross as to amount to fraud," which seems like speaking of carelessness so great as to amount to design; in another place, *Ibid.* 192, of "negligence so gross as to amount to constructive fraud;" and again, *Ibid.* 193, of a "circumstance of so gross negligence * * * that it is conclusive evidence of fraud."

In the subsequent case of *Martinez* v. *Cooper,* 2 *Russ.* 198, 217, Lord *Eldon* referred to *Evans* v. *Bicknell,* 6 *Ves.* 174, as having settled the principle, which he again expresses in nearly similar language. "There must be," he says, "either direct fraud, or negligence amounting to evidence of fraud, to induce this Court to interfere for the purpose of postponing a party who insists on the legal benefit of his deed." All this language of Lord *Eldon,* though loose and difficult to construe, appears to us to point to fraud, as the necessary conclusion before the Court can deprive the owner of the legal estate of his legal rights derived from that estate. This fraud, no doubt, may be arrived at either by direct evidence or by evidence circumstantial and indirect, and it does not cease to be fraud, because the particular object in contemplation of the parties may have been a fraud in some respects different from the fraud actually accomplished; or because the person intended to have been defrauded may be different from the person actually defrauded; or because the original fraudulent intention had no particular person in view: See *Beckett* v. *Cordley,* 1 *Bro. C. C.* 353, and per Lord *Eldon* in *Evans* v. *Bicknell,* 6 *Ves.* 192.

That fraud and fraud alone was the ground for postponing the legal estate was, we think, the opinion of Lord *Hardwicke* in *Le Neve* v. *Le Neve, Amb.* 436, 447. "Fraud, or *mala fides,* therefore," he said, "is the true ground on which the Court is governed in the cases of notice."

That Sir *William Grant* entertained the same view, and considered it as the result of *Evans* v. *Bicknell,* 6 *Ves.* 174, is apparent from his observations in *Barnett* v. *Weston,* 12 *Ves.* 130, 133, where he said that the old cases for postponing the first mortgagee had been shaken unless a case of fraud could be made out.

That Lord Justice *James* adopted the same rule is plain from what he said in the case of *Ratcliffe* v. *Barnard, Law Rep.* 6 *Ch.* 652. "The legal mortgagee must," he said, "have been guilty of fraud, or of that wilful negligence which leads the Court to conclude that he is an accomplice in the fraud."

From this consensus of expression as to the true rule, some departure

is said by the learned counsel for the Defendant to have occurred in the language used by Lord *Cranworth*, L. C., in the case of *Colyer* v. *Finch*, 5 *H. L. C.* 905, and of *Roberts* v. *Croft*, 2 *De G. & J.* 1. It is enough to say that in our opinion the Lord Chancellor plainly intended in both of these cases to lay down no new principle, and his use of the expression "negligence so gross as to be tantamount to a fraud," and his emphatic reliance on the cases of *Evans* v. *Bicknell* and *Martinez* v. *Cooper*, 2 *Russ.* 198, in his judgment in *Colyer* v. *Finch* are sufficient evidence of this intention.

Turning now to the decisions, mostly subsequent to that of *Evans* v. *Bicknell*, which have been cited in argument, it will be found that the cases which have arisen on the conduct of the mortgagee in not obtaining possession of the title deeds may be ranged in the following classes:—

(1.) Where the legal mortgagee or purchaser has made no inquiry for the title deeds and has been postponed, either to a prior equitable estate as in *Worthington* v. *Morgan*, 16 *Sim.* 547, or to a subsequent equitable owner who used diligence in inquiring for the title deeds, as in *Clarke* v. *Palmer*, 21 *Ch. D.* 124. In these cases the Courts have considered the conduct of the mortgagee in making no inquiry to be evidence of the fraudulent intent to escape notice of a prior equity, and in the latter case that a subsequent mortgagee, who was, in fact, misled by the mortgagor taking advantage of the conduct of the legal mortgagee, could as against him take advantage of the fraudulent intent.

(2.) Where the legal mortgagee has made inquiry for the deeds and has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority, as in *Barnett* v. *Weston*, 12 *Ves.* 130; *Hewitt* v. *Loosemore*, 9 *Hare*, 449; *Agra Bank* v. *Barry*, *Law Rep.* 7 *H. L.* 135.

(3.) Where the legal mortgagee has received part of the deeds under a reasonable belief that he was receiving all and has accordingly not lost his priority, as in *Hunt* v. *Elmes*, 2 *D. F. & J.* 578, *Ratcliffe* v. *Barnard*, *Law Rep.* 6 *Ch.* 652, and *Colyer* v. *Finch*, 5 *H. L. C.* 905.

(4.) Where the legal mortgagee has left the deeds in the hands of the mortgagor with authority to deal with them for the purpose of his raising money on security of the estate, and he has exceeded the collateral instructions given to him. In these cases the legal mortgagee has been postponed, as in *Perry-Herrick* v. *Attwood*, 2 *De G. & J.* 21. This case was decided not on the ground that the legal mortgagees had been guilty of fraud, but on the ground that as they had left the deeds in the hands of the mortgagor for the purpose of raising money, they could not insist, as against those who in reliance on the deeds lent their money, that the mortgagor had exceeded his authority.

The cases where the mortgagee having received the deeds has subsequently parted with them, or suffered them to fall into the hands of the mortgagor, will be found to fall into the following classes:—

(1.) Where the title deeds have been lent by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to the

object in borrowing them, and the legal mortgagee has retained his priority over the subsequent equities, as *Peter* v. *Russel,* or *Thatched House Case,* 1 *Eq. Ca. Abr.* 321; *Martinez* v. *Cooper,* 2 *Russ.* 198.

(2.) Where the legal mortgagee has returned the deeds to the mortgagor for the express purpose of raising money on them, though with the expectation that he would disclose the existence of the prior security to any second mortgagee: *Briggs* v. *Jones, Law Rep.* 10 *Eq.* 92. In such cases the Court has, on the ground of authority, postponed the legal to the equitable estate. This is the same in principle as the decision in *Perry-Herrick* v. *Attwood,* 2 *De G. & J.* 21.

No case has been cited in which the legal mortgagee has (as by the Vice-Chancellor in this case) been postponed by reason of negligence in the custody of the deeds.

The decisions on negligence at common law have been pressed on us in the present case, but it appears to us enough to observe, that the action at law for negligence imports the existence of a duty on the part of the defendant to the plaintiff, and a loss suffered as a direct consequence of the breach of such duty; and that in the present case it is impossible to find any duty undertaken by the Plaintiff company to the Defendant, Mrs. *Whipp.* The case was argued as if the legal owner of land owed a duty to all other of Her Majesty's subjects to keep his title deeds secure; as if title deeds were in the eye of the law analogous to fierce dogs or destructive elements, where from the nature of the thing the Courts have implied a general duty of safe custody on the part of the person having their possession or control. This view is in our opinion impliedly negatived by the whole course of decisions, and it is expressly repelled by the observations of the present Lord Chancellor in *Agra Bank* v. *Barry, Law Rep.* 7 *H. L.* 157, where he said, "It has been said in argument that investigation of title and inquiry after deeds is 'the duty' of a purchaser or a mortgagee; and, no doubt, there are authorities (not involving any question of registry), which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design, inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation, must always be a question to be decided with reference to the nature and circumstances of each particular case." These observations appear to us conclusive on the point, and they at the same time suggest the conclusion, that if in any case it shall appear that a prior legal mortgagee has undertaken any duty as to the custody of the deeds towards any given person, and has neglected to perform that duty with due care, and has thereby injured the person to whom the duty was owed, there the legal

estate might be postponed by reason of the negligence. But no such case appears as yet to have arisen, nor does it seem one likely often to occur. The point certainly does not arise in the present case, and we therefore give no opinion upon it.

The authorities which we have reviewed appear to us to justify the following conclusions:—

(1) That the Court will postpone the prior legal estate to a subsequent equitable estate: (*a*), where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence, where such conduct cannot otherwise be explained; (*b*), where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate.

But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner.

Now to apply the conclusions thus arrived at to the facts of the present case. That there was great carelessness in the manner in which the Plaintiff company through its directors dealt with their securities seems to us to admit of no doubt. But is that carelessness evidence of any fraud? We think that it is not. Of what fraud is it evidence? The Plaintiffs never combined with *Crabtree* to induce the Defendant to lend her money. They never knew that she was lending it, and stood by. They can have had no motive to desire that their deeds should be abstracted and their own title clouded. Their carelessness may be called gross, but in our judgment it was carelessness likely to injure and not to benefit the Plaintiff company, and accordingly has no tendency to convict them of fraud.

Then comes the inquiry whether the Plaintiff company constituted *Crabtree* their agent to raise money, in which case the Defendant might benefit the Plaintiff company, and accordingly has no tendency to contention was, in our opinion, the possession by *Crabtree* of the key. But the Defendant has not proved the circumstances attending this fact, or the duties for the performance of which the key may have been essential, with sufficient distinctness to enable us to conclude from the possession of the key that it implied an authority to deal with the securities of the Plaintiff company. The cases in which *Crabtree* did so deal with the securities, when carefully considered, appear to us insufficient to support the authority claimed; and the fact that *Crabtree* in dealing with the Defendant suppressed his mortgage to the company and dealt with her, not as agent of the company having an authority to pledge its securities, but as the unencumbered owner of the property, goes, we think, far to

negative the suggested authority. On this point, therefore, we agree with the Vice-Chancellor. * * *

Differing as we do from the learned Vice-Chancellor on the one point on which he decided against the Plaintiffs, we conclude that his judgment must be discharged, and that instead of it the Court must declare the Plaintiffs entitled to priority and give the usual consequent relief. The Plaintiffs must add to their security so much of the costs of the action in the Court below as would have been incurred if the action had been a simple action for foreclosure and no question of priority had been raised, and the Defendant must pay to the Plaintiffs the residue of the Plaintiffs' costs in the Court below and the whole of the costs of the appeal.[1]

[1] "A good illustration of the effect which equity gives to the acquisition of the legal title in those cases in which the equities are equal, is afforded by *Thorndike* v. *Hunt* [(1859) 3 *De G. & J.* 563]. There a trustee under two different settlements, having misappropriated the funds of one, replaced them by a transfer of funds belonging to the other. In a suit instituted by a *cestiu que trust* under the first settlement, the trustee transferred the money into court, and the money was treated as belonging to that estate, the legal title consequently resting in the accountant general for the purpose of that trust. The question was whether the *cestui que trust* under the second settlement had a right to follow this fund, and it was held that he had not, because the transfer being without notice and for value (i. e, in discharge of the debt due by the defaulting trustee) the *cestui que trust* under the first settlement had just as strong an equity to retain the fund as the *cestui que trust* under the second settlement had to follow it; and it therefore followed that the circumstances of the legal title being held by the accountant general for the former was enough to create a preference in his favor."—*Bispham, Principles of Equity* § 40.

"This maxim [equal equities, the legal title will prevail] and the one examined in the last preceding section [equal equities, first in order of time prevails] must be taken in connection, in order to constitute the enunciation of a complete principle. The first applies to a certain condition of facts; the other supplements its operation by applying to additional facts by which equitable rights and duties may be affected. The two are in fact counterparts of each other, and taken together they form the source of the doctrines, in their entire scope, concerning priorities, notice, and purchasers for a valuable consideration and without notice."—*Pomeroy, Equity Jurisprudence* § 416.

And see 2 *Spence, Jurisdiction of the Court of Chancery* 720 *et seq.*

K.—Equality is Equity.

NELTHROP *v.* HILL.

In Chancery, before Lord Keeper Bridgman, 1669.[1]

[1 *Cases in Chancery* 135.]

This cause was heard first before the Lord Keeper. The case. The plaintiff Margaret and the defendant Anne were the two daughters of Smith, who having made his will eighteen years since; and Hill, executor and curator of the children (both then in infancy) by his will gave several legacies, and then gave the residue of his personal estate to be equally divided between his two daughters, Anne and Margaret; and if both die before marriage or full age, then he deviseth it over to another. Biscoe marrieth Anne the eldest sister, and then one moiety of the estate, which was good, and in the hands of the executor, is paid to Biscoe and his wife, and Biscoe settles a jointure for this on his wife, and gives the executor a discharge.

Afterwards the executor puts out the other moiety (Margaret being still in minority) on security, and part of it is lost. Then Margaret marries Nelthrop, and they bring this bill against the executor and Biscoe and his wife to have a contribution towards the loss borne by them, and to have Biscoe refund.

Upon the first hearing it was so decreed, unless Biscoe showed precedents to the contrary.

Now upon farther hearing this day, (viz. 10 Jan. 1669,) before the Lord Keeper, Mr. Jus. *Wild* and Mr. Baron *Turner*, it was for Biscoe insisted, that by the marriage of Anne, her moiety became due, and the devise over is defeated: so that if Biscoe and his wife had brought their bill for it, the executor could not have denied payment of it, and so Biscoe hath done no default, who hath not his money till due, and he is not concerned to look any farther; and in lieu of the portion a jointure is made, and a release for the legacy is given; and probably, if the executor would not have paid, Anne might have lost her preferment, and the executor was by the will the curator of the children. And it was said, that by Anne's marriage first, she became first entitled. And it was insisted, that where legacies are payable at several times, and the legacy that is first due is paid when due, and there is money in the executor's hands to pay the other legacies, that if a loss fall on that afterwards, there is equity in that case to put the first paid legatee to refund.

For the plaintiff it was insisted, that there was in this case no time

[1] Justice Windham and Baron Turner sat with the Lord Keeper.

limited for payment of either; and that by the marriage of Anne, the devise over being defeated, both became due and payable, the devise being indefinite, without any express time of payment; and the plaintiff Margaret's infancy ought not to turn to her prejudice; and that it was the testator's intention that they should have it equally, one as much as the other. And if Biscoe had sued, the executor might have required security to refund.

And it was said and admitted by the court, that if executors pay out the assets in legacies, and afterwards debts appear, and they be forced to pay them, of which they had no notice before the legacies paid, that the executors by a bill here might force the legatees to refund.[1]

But as to that it was answered, that case was not like to this; for there was not enough to pay all when the legacies were paid, but here was enough when the legacies were paid to pay all, and the loss since.

And for the plaintiff it was farther insisted, that a division could not be made without the plaintiff Margaret called to it; and the case of Grove and Banson insisted on, where Banson had a conveyance and statute for his wife's legacy, and yet put to refund.

But as to that case it was answered, there was not any payment, but a security, and by that he would have had a redemption; so this payment was not paid, but executory. And the plaintiff cited the case of Picks and Vincner upon Sir Henry Martin's certificate, which was 29 Oct. 1639, and was in substance thus: that an executor may not pay one, if he hath not enough to pay all; and an executor is not bound to pay a legacy without security to refund if there be want of assets to pay either debts or legacies. Which was not, as is said, to this purpose, there being at the time when this legacy was paid, enough to pay all.

Ordered the cause be set down to be re-heard originally, as well against the executor, as the legatee Biscoe and his wife.

Quære, if there be not a difference between debts and legacies thus:

[1] *Lord Chancellor* [NOTTINGHAM]. "There is a difference between a suit for a legacy in this court, and a suit for a legacy in the Spiritual Court. If in the Spiritual Court they would compel an executor to pay a legacy without security to refund, there shall go a prohibition, as was resolved in the case of Knight and Clarke; but in this court, though there be no provision for refunding, yet the common justice of this court will compel a legatee to refund. It is certain that a creditor shall compel a legatee to refund, and so shall one legatee compel the other, where the assets become deficient; but whether the executor himself, after he has once voluntarily assented unto a legacy, shall compel the legatee to refund, is *causa primae impressionis:* and it must be admitted there is a great difference between a voluntary assent, and where the executor was compelled to assent. We know the common case, if a man voluntarily pays money to a bankrupt, after he becomes a bankrupt, it is in his own wrong, and he may be forced to pay it again; but otherwise it is, if the bankrupt recover it against him by course of law; and a small matter may amount to an assent to a legacy; an assent being but a rightful act." Noel *v.* Robinson, 1682, 1 Vern. 90, 93.

debts may appear to the executors, but legacies appear in the will? and *quære*, if therefore executors be not bound more strictly to take security against legacies that do appear, than debts that do not?[1]

BROWN *v.* ALLEN.

IN CHANCERY, BEFORE LORD CHANCELLOR NOTTINGHAM, 1681.

[1 *Vernon* 31.]

It was declared by the *Lord Chancellor*, that where a man devises a specific legacy, there though the other legacies fall short, yet the legatee must have his specific legacy entire: But where a man devises several legacies, as 100*l.* to one, and 50*l.* to another, &c. there although he directs the legacy of 100*l.* to be paid *in the first place*, yet if the other legacies fall short, there the legatee of the 100*l.* must make a proportionable abatement of his legacy.

ANONIMOUS.

IN CHANCERY, BEFORE LORD KEEPER NORTH, 1683.

[1 *Vernon* 162.]

A. being indebted unto *B.* makes *C.* his executor. *C.* wastes the estate and dies, and makes *D.* his executor, and by his will devises several legacies. *D.* pays the legacies. *B.* exhibits a bill against *D.* the executor of *C.* for his debt due from the first testator, and against the legatees in the will of *C.* to compel them to refund their legacies, there not being now sufficient assets of the first testator.

Decreed that the legatees should refund.

[1] "Equity is the suitable adjustment of things, which in like causes seeks to administer like rights, and adjusts all things well on an equal platform, and it is termed equity, as being as it were equality, and it is employed in things, that is, in the sayings and actions of men." Bracton, Lib. 1, Cap. 4, § 5.

"While the common law looked at and protected the rights of a person as a separate and distinct individual, equity rather regards and maintains, as far as possible, the rights of all who are connected by any common bond of interest or of obligation." Pomeroy Equity Jurisprudence § 405.

For a collection of the early cases, with notes, see Francis Maxims in Equity 9; and see also 2 Spence Jurisdiction of the Court of Chancery ch. 8, pp. 721, 817.

GOSLING *v.* DORNEY.

IN CHANCERY, BEFORE LORD CHANCELLOR JEFFERIES, 1687.

[1 *Vernon* 482.]

Where land is devised to be sold for the payment of debts and legacies: the *Lord Chancellor* was of opinion, that the debts and legacies should be paid in equal proportion without any preference to the debts: and so it was resolved in the case of Sir *John Bowles* by the Lord *Nottingham*, that debts and legacies should be paid *pari passu;* but the Lord *North* reversed that decree, and gave preference to the debts: and so the Lord *North* likewise in the case of *Hixon* and *Witham*, decreed the debts to be first paid; but the *Lord Chancellor* declared he was not satisfied with the opinion, but would consider of it.

MAYTIN *v.* HOPER (1744) *Cases Temp. Hardwicke* (*Ridgway*) 206, 209: Mr. *Attorney General:* If an estate is devised in trust to be sold for payment of debts and legacies, the bond and simple contract creditors shall be paid in preference to the legatees, and though this might have been decreed otherwise formerly, yet it is now the established equity of this court, which will decree the testator to do as he ought to do, by being just, before he ventures to be bountiful; and as a former Chancellor said, a court of equity shall not decree a man to sin in his grave.

To which the Lord Chancellor Hardwicke assented, and said it was now settled for debts to be paid before legacies, out of equitable assets, or where the fund was merely a trust.[1]

LORD KENNOULE *v.* EARL OF BEDFORD.

IN CHANCERY, BEFORE LORD CHANCELLOR NOTTINGHAM, 1676.

[1 *Cases in Chancery* 295.]

The case was, the earl by his last will devised his debts to be paid by his lands in D. and if those sufficed not, by sale of his lands in S. and if those sufficed not, by sale of his park; and if that sufficed not, by sale of his lands in Waltham, and devised that the plaintiff should have 600*l.*

[1] See to the same effect, Sir Wm. Grant in Kidney *v.* Coussmaker, 1806, 12 Ves. 136, 154.

per annum, during his life out of his lands in Waltham. The trustees sold D. and S. and a great part of his lands in Waltham, and paid the debts; but the park was not sold; but the lands in Waltham not sold are not sufficient to answer the annuity which was 4,000*l.* arrear. It was prayed that since Waltham lands were sold instead of his park, that the park might be sold to satisfy the arrears, which was ordered accordingly, and the money to be so applied. But there arose some impediment in the sale by reason of some title pretended to the park by some who were no parties to the bill; and thereupon, however, the possession of the park was decreed to the plaintiff against the trustees, and all the profits of Waltham lands unsold.

ANONYMUS.

IN CHANCERY, BEFORE LORD CHANCELLOR NOTTINGHAM, 1681.

[2 *Ventris* 353.]

NOTE: It is the Course here, that where a Man dies in Debt, and under several Incumbrances, (*viz.*) Judgments, Statutes, Mortgages, &c. and the Heir at Law buys in any of them that are of the first Date, if those which have the later Securities prefer their Bill, the Incumbrances bought in shall not stand in their Way for more than the Heir really paid for them.

CHILD *v.* STEPHENS.

IN CHANCERY, BEFORE LORD CHANCELLOR NOTTINGHAM, 1682.

[1 *Vernon* 101.]

This case came before the *Lord Chancellor,* upon a point reported specially by the *Master* for his lordship's judgment, and was in short no more than this. Upon Mr. *Child's* estate there were many mortgages, judgments, and statutes, and he likewise owed several debts upon bond and simple contract, and had both by deed in his life-time and by will conveyed and settled all his lands upon trustees for payment of his debts: now some parts of his estate he had mortgaged no less than thrice over; each time for near the full value.

It was now insisted, that these subsequent mortgages were not incumbrances on the land; for all the estate in law was in the first mortgagee, and so the subsequent mortgagees had only an equity; and likewise the

judgments, they would not immediately affect the land then in mortgage: and it comes within the common case, where a man settles by deed, or devises by will, lands for payment of his debts; there all creditors shall be paid alike in proportion; whether they are creditors by bonds or on simple contract, unless their security do affect the very land so settled or devised for payment of debts; and therefore the subsequent judgments and mortgages ought only to be paid in proportion with the bond creditors and debts upon simple contract, which the *Lord Chancellor* at first conceived ought to be so done; and asked what could be said against it.

Whereupon it was insisted, that the mortgagees had a security for their money, which a court of equity would never take from them, and being so, there could be no sale made of this estate without their consent; and so all the debts would remain unsatisfied: for they that had the subsequent securities, had still, in preservation of their own interest, a right to redeem: and to set this estate in a course of redemption, would make pretty work in this case, where there were more than thirty mortgages. For example, *A.* is a subsequent mortgagee; *B.* has a prior mortgage of a moiety of the lands contained in *A.'s* mortgage, and also several other lands. *C.* has a prior mortgage of the other moiety of the lands comprised in *A.'s* mortgage, and also of several other lands: now has *A.* a plain right to redeem all the lands contained in both the mortgages of *B.* and *C.*; and so it may be carried on through the alphabet.

And after long debate, the *Lord Chancellor* ordered, that the real securities should be first satisfied,[1] and then the debts by bond and simple contract to be paid in average; for that any other method in this case would become impracticable.

Afterwards at another day, viz. 5th of *December,* being the first seal, a motion was made in this case on behalf of one *Penruddocke,* (who had a judgment on this estate) that he might be let into a satisfaction of his judgment, before the second mortgagees, he being at law intitled to that preference, and therefore ought not to be deprived of it in equity.

The *Lord Chancellor* declared, he thought the motion reasonable; till upon repeating the reasons above mentioned he was satisfied, it was not to be done in this case: if legal preference should be precisely observed, it would end in confusion; and so made no order upon the motion; all the other creditors having consented to the former order; but left *Penruddocke* to get his satisfaction, as he could by law.

[1] "But otherwise it is in case of debts on judgments, that in their own nature charge the lands." Wolestoncroft *v.* Long, 1663, 1 Cases in Ch. 32 (see case printed, *supra*).

For a collection of the early cases on this point, see Comyn's Digest, Chancery, 3 A. 4.

LAKE *v.* GIBSON.

IN CHANCERY, BEFORE SIR JOSEPH JEKYLL, M. R., 1729

[1 *Equity Cases Abridged* 290.][1]

The Commissioners of Sewers had sold and conveyed lands to five persons and their heirs, who afterwards, in order to improve and cultivate those lands, entered into articles whereby they agreed to be equally concerned as to profit and loss, and to advance each of them such a sum to be laid out in the manurance and improvement of the land.

SIR JOSEPH JEKYLL, M. R., held that they were tenants in common, and not joint tenants, as to the *beneficial interest* or *right* in those lands, and that the survivor should not go away with the whole; for then it might happen that some might have paid or laid out their share of the money, and others, who had laid out nothing, go away with the whole estate.

And his Honor held, that when two or more purchase lands, and advance the money in *equal* proportions, and take a conveyance to them and their heirs, that this is a joint-tenancy; that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other; but where the proportions of the money are *not equal*, and this appears in the deed itself, this makes them *in the nature of partners;* and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others, in proportion to the sums advanced by each of them.

So, if two or more make a joint purchase and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it; and that in all other cases of a joint undertaking or partnership, either in trade or any other dealing, they were to be considered as tenants in common, or the survivors as trustees for those who were dead.

DERING *v.* EARL OF WINCHELSEA.

IN CHANCERY, 1787.

[1 *Cox Chancery* 318.]

Thomas Dering, Esq. having been appointed collector of some of the duties belonging to the customs, it became necessary upon such appointment for him to enter into bonds to the crown with three securities for

[1] This case is printed as it appears in 1 White and Tudor's Leading Cases in Equity, 4th Am. ed. Pt. 1, p. 264 (* 177). See the same citation for a valuable note on Sir Joseph Jekyll's remark concerning purchases by equal and unequal proportions, p. 268.

the due performance of this office. Sir Edward Dering his brother, the Earl of Winchelsea, and Sir John Rous, having agreed to become sureties for him, a joint and several bond was executed by Thomas Dering and Sir Edward Dering to the crown in the penalty of 4000*l.*, another joint and several bond by Thomas Dering and the Earl of Winchelsea, and a third by Thomas Dering and Sir John Rous in the same penalty of 4000*l.*, all conditioned alike for the due performance of Thomas Dering's duty as collector. Mr. Dering being in arrear to the crown to the amount of 3883*l.* 14*s.*, the crown put the first bond in suit against Sir Edward Dering, and judgment was obtained thereon for that sum: whereupon Sir Edward filed this bill against the Earl of Winchelsea and Sir John Rous, claiming from them a contribution towards the sum so recovered against him.

The cause had been argued at length, in Michaelmas Term last, and now stood for judgment.

Lord Chief Baron [EYRE].[1] * * * The real point is whether a contribution can be demanded between the obligors of distinct and separate obligations under the circumstances of this case. It is admitted that if there had been only one bond in which the three sureties had joined for 12,000*l.* there must have been a contribution amongst them to the extent of any loss sustained; but it is said that that case proceeds on the contract and privity subsisting amongst the sureties, which this case excludes; that this case admits of the supposition that the three sureties are perfect strangers to each other, and each of them might be ignorant of the other sureties, and that it would be strange to imply any contract as amongst the sureties in this situation; that these are perfectly distinct undertakings without connection with each other, and it is added, that the contribution can never be *eodem modo*, as in the three joining in one bond for 12,000*l.*, for there, if one of them become insolvent, the two others would be liable to contribute in moieties to the amount of 6000*l.* each, whereas here it is impossible to make them contribute beyond the penalty of the bond. *Mr. Madocks* has stated what is decisive, if true, that nobody is liable to contribute who does not appear on the face of the bond; if this means only that there is no contract, then it comes back to the question, whether the right of contribution is founded on contract. If we take a view of the cases both in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it, as in Swain *v.* Wall, 1 Ch. Rep. 149. In the Register, 176, b. there are two writs of contributions, one *inter-cohæredes*, the other *inter-cofeoffatos:* these are founded on the statute of *Marlbridge:* the great object of the statute is to protect the inheritance from more suits than are necessary. Though contribution is a part of the provision of the statute, yet in Fitz. N. B. 338, there is a writ of con-

[1] A part of the opinion (which was printed under the maxim as to the clean hands of a suitor, supra) has been omitted.

tribution at common law amongst tenants in common, as for a mill falling to decay. In the same page *Fitzherbert* takes notice of contribution between co-heirs and co-feoffees, and as between co-feoffees he supposes there shall be no contribution without an agreement, and the words of the writ countenance such an idea, for the words are "*ex eorum assensu,*" and yet this seems to contravene the express provision of the statute: as to co-heirs the statute is express; it does not say so as to feoffees, but it gives contribution in the same manner. In Sir *William Herbert's* case, 3 *Co.* 11. *b.,* many cases of contribution are put; and the reason given in the books is, that in *equali jure* the law requires equality; one shall not bear the burthen in ease of the rest, and the law is grounded in great equity. *Contract* is never mentioned. Now the doctrine of equality operates more effectually in this court than in a court of law. The difficulty in *Coke's Cases* was how to make them contribute; they were put to their *audita querela,* or *scire facias.* In equity there is a string of cases in 1 *Eq. Ca. Abr. tit.* "Contribution and average." Another case occurs in *Harg. Law Tracts* on the right of the King on the prisage of wine. The King is entitled to one ton before the mast, and one ton behind, and in that case a right of contribution accrues; for the King may take by his prerogative any two tons of wine he thinks fit, by which one man might suffer solely; but the contribution is given of course on general principles which govern all these cases. Now to come to the particular case of sureties; it is clear that one surety may compel a contribution for another, towards payment of a debt to which they are jointly bound. On what principle? Can it be necessary to resort to the circumstance of a joint bond? What, if they are jointly and severally bound? What difference will it make if they are severally bound, and by what *different* instruments, but for the *same* principal, and the *same* engagement? In all these cases the sureties have a common interest, and a common burthen; they are joined by the common end and purpose of their several obligations, as much as if they were joined in one instrument, with this difference only, that the penalties will ascertain the proportion in which they are to contribute, whereas if they had joined in one bond, it must have depended on other circumstances. In this case the three sureties are all bound that Mr. Dering shall account for the moneys he receives; this is a common burthen; all the bonds are forfeited at law; and in this court, as far as the balance due; the balance might have been so great as to have exhausted all the penalties, and then the obligee forces them all to pay; but here the balance is something less than one of the penalties. Now who ought to pay this? the one who is sued must pay it to the crown, as in the case of prisage, but, as between themselves, there shall be a contribution, for they are in *equali jure.* This is carried a great way, where they are joined in one obligation, for if one should pay the whole 12,000*l.,* and the second were insolvent, the third shall contribute a moiety, though he certainly never meant to be liable for more than a third: this circumstance, and the possibility of one being

liable for the whole, if the other two should prove insolvent, suggested the mode of entering into separate bonds; but this does not vary the reason for contribution, for there is the same principal and the same engagement: all are equally liable to the obligee to the extent of the penalty of the bonds when they are not all exhausted: if, as in the common case of a joint bond, no distinction is to be made, why shall not the same rule govern here? As in the case of average of cargo in a court of law, *qui sentit commodum sentire debet et onus.* This principle has a direct application here, for the charging one surety, discharges the other, and each therefore ought to contribute to the *onus.* In questions of average there is no contract or privity in ordinary cases, but it is the result of general justice from the equality of burthen and benefit: then there is no difficulty or absurdity in making a contribution take place in this case, if not founded on contract, nor any difficulty in adjusting the proportions in which they are to contribute; for the penalties will necessarily determine this.

The objection in point of form, which I before mentioned, is, that the bill cannot be sustained, inasmuch as it has not charged the insolvency of the principal debtor, and that such a charge is absolutely necessary. As a question of form, it ought to have been brought on by demurrer; but in substance the insolvency of Mr. Dering may be collected from the whole proceedings, which strongly imply it; for the plaintiff appears to have submitted to the judgment, and the defendants have made their defence on other grounds. Lawson *v.* White, ante, 276.

On the whole, therefore, we think that the plaintiff is entitled to the relief he prays, and declare that the balance due from Thomas Dering being admitted on all hands to amount to the sum of 3883*l.* 14*s.* 8½*d.* the plaintiff Sir Edward Dering, and the two defendants the Earl of Winchelsea and Sir John Rous ought to contribute in equal shares to the payment of that sum, and direct that the said plaintiff and defendants do pay in discharge thereof each of them the sum of 1294*l.* 11*s.* 7*d.* And that on payment thereof the *Attorney-General* shall acknowledge satisfaction on the record of the said judgment, and that the two bonds entered into by the Earl of Winshelsea and Sir John Rous, be delivered up to them respectively. But this not being a very favourable case to the plaintiff, and the equity he asks being doubtful, we do not think it a case for costs.[1]

[1] "'The principle,' observed Lord Redesdale, 'established in the case of Dering *v.* Lord Winchelsea, is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by con-

SIBLEY *v.* BAKER.

In the Supreme Court of Michigan, 1871.

[23 *Michigan* 312.]

Appeal in Chancery from Eaton Circuit.

This was a foreclosure bill filed by Hiram Sibley against Jennie Baker, Alonzo Baker, Nelson G. Isbell and O. F. Winchester, trustee for the Winchester Repeating Arms Company. The facts are sufficiently set forth in the opinion.

Cooley, J.[1]

This is a foreclosure case, and the questions which arise relate to the marshaling of securities. It seems that the mortgagor first gave a mortgage to complainant on three parcels of land, which for our present purpose we may designate as parcels one, two and three. Afterwards he gave a second mortgage to complainant on parcels one and two, and still later a third mortgage to defendant Winchester on parcels two and three. The complainant foreclosed the second mortgage in chancery, making Winchester a party to the suit, and the decree which he obtained directed that parcel two, for Winchester's protection, should be sold last. The sale was made as directed, and defendant Isbell became the purchaser of both parcels for a sum in the aggregate equaling the amount due upon the decree, taking them subject to the first mortgage. The present suit was afterwards brought for the foreclosure of the first mortgage, and in this it is shown that defendant Isbell has become the purchaser of complainant's interest in parcels one and two, but on the understanding that when sale is made on the foreclosure of this mortgage, parcel three shall be sold first. And the question now is whether the decree shall be in accordance with this understanding, or whether, on the other hand, defendant Winchester has not a right to demand that the first parcel to

tract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of the decision in Dering *v.* Lord Winchelsea; and in that case there was no evidence of contract;' Stirling *v.* Forrester, 3 Bligh. 59. See also Craythorne *v.* Swinburne, 14 Ves. 160, 165, 169; Hartley *v.* O'Flaherty, 1 Beat. 77, 78; Ware *v.* Horwood, 14 Ves. 31; Mayhew *v.* Crickett, and note, 2 Swanst. 189, 192; Spottisword's Case, 6 De G. Mac. & G. 345, 371, 375; Whiting *v.* Burke, 10 L. R. Eq. 539; 6 L. R. Ch. App. 342; where the doctrine laid down in Dering *v.* Lord Winchelsea has been recognized and approved of."—Note to Dering *v.* Lord Winchelsea in 1 White & Tudor's Leading Cases in Equity, Pt. 1, 124 (* 106); and see the balance of the note.

[1] It is scarcely necessary to state that the Cooley of the principal case is Thomas M. Cooley, an ornament of the bench and bar of the United States, as well as of Michigan. Known for his texts on Torts and Taxation, it is by his classical treatise on Constitutional Limitations that his name is familiar in Europe and an unquestioned authority in America.

be sold shall be parcel one. The circuit judge thought he had, and made decree to that effect.

To determine whether this decree was right, we may apply some very simple tests. It must be conceded that complainant while holding the first and second mortgages had a right to have the latter protected on any foreclosure of the former, so far as the land mortgaged could give protection; the just presumption being that both parties understood when giving and taking the same that both securities were to be made effectual, and not that any rule of law was to be applied by means of which one should be made to destroy the other. But in order to protect the second mortgage, the mortgagee must have had the right, on the foreclosure of the first mortgage, to have parcel three sold first, since, as the second mortgage only covered parcels one and two, if those should be first resorted to for the satisfaction of the first mortgage, and sufficient for the purpose should be realized from them, the effect would be that the second mortgage would thereby be cut off, and complainant would have received no benefit whatever from parcel three having been included in his mortgage.

It will not be claimed, we suppose, that the giving of a third mortgage could have the effect to take from the holder of the others any right he had to make his securities available; and if not, then parcel three, after such mortgage was given, must have remained as it was before, the primary fund for the satisfaction of the first mortgage. And this order of sale being established for the protection of the second mortgage, a purchaser on the foreclosure of that mortgage must have a right to insist upon being protected in his purchase, inasmuch as the right in the mortgagee to have the securities marshaled would be of no value to him if it did not continue for the protection of the purchaser. This being the law, we must suppose defendant Winchester to have been aware of it, and to have understood when he took his security on parcel three that it was liable to be the first resort for the satisfaction of the first mortgage.

We shall reach the same conclusion by a simple application of the familiar rule, that where a mortgage is foreclosed which covers several parcels, some of which have been sold or incumbered by the mortgagor since it was given, the sale of the parcels shall be decreed to be made in the inverse order of their alienation. This rule, as between the first and second mortgages, requires parcel three to be first sold when the former is foreclosed. If those mortgages had been given to different persons, this would be conceded; but we think it can make no difference that both were given to the same person. We perceive no reason in the fact of complainant holding one mortgage which should make a second any less available to him as a legal security, than it would have been if taken by a third person; and it could not be equally available if a purchaser under it would not be equally protected. And in this connection it may be well to bear in mind the design and object of the rules for the marshaling of

securities at the instance of subsequent incumbrancers. Those rules never assume to take from a prior incumbrancer any substantial right; their purpose is to require the prior incumbrancer to enforce his just rights in such order of priority as, without loss to himself, will protect, as far as may be practicable, the subsequently acquired interests of others. But the claim of defendant Winchester, if conceded, would have deprived complainant, as owner of the second mortgage, of a substantial right, as we have already seen.

The right of this defendant may also be tested by ascertaining what privilege of redemption he would have had if the first mortgage had been foreclosed under the statute, and all the parcels sold separately. Parcel three he might redeem, because he has a mortgage on the equity of redemption in that, which has never in any way been cut off or extinguished. But he could not redeem parcel two and claim a right to be subrogated to the rights of the mortgagee therein, because his lien on the equity of redemption in that parcel has been extinguished by the foreclosure and sale under the second mortgage. Neither could he redeem and claim the like right of subrogation as to parcel one, for upon that he never had any lien, nor has he had any right in respect to it, except that it should be made use of as a fund for the protection of his mortgage. But that right was claimed by, and conceded to, him on the foreclosure of the second mortgage, and to concede it again, on the foreclosure of the first, would be inconsistent with the corresponding right on the part of the purchaser under the second mortgage, which, being first in date, is also first in equity.

It is said on behalf of defendant Winchester, that he has never, until now, had an opportunity to protect his interest in parcel three, because, had he bid, at the sale under the prior foreclosure, a sum greater than the amount due on the decree, it must have been paid over to the mortgagor, and consequently would have been of no avail in reducing the securities. But this is a mistake; any surplus on that sale must have been paid into court, and would have been applied on some one of the securities on the proper petition being presented.

It is also said that defendant Isbell made his purchase under the second mortgage subject to the first. This appears to be true, but it also appears that it was part of the arrangement that when the first mortgage was foreclosed parcel three should be first sold. As an agreement to this effect was in accordance with the order established by law, and therefore wronged no one, we discover nothing to preclude its being made. The substance of the arrangement was, that he bought subject to the first mortgage, but with the understanding that when that mortgage was foreclosed, the relative rights of parties as then established by law should not be disturbed.

The decree of the circuit court in chancery must be so modified as to conform to these views, and the cause must be remanded for further proceedings. The costs of defendant Isbell on this appeal will be taxed in

the cause and added to the amount for which sale is to be made under the decree.

The other Justices concurred.

LANOY *v.* DUKE AND DUTCHESS OF ATHOL (1742) 2 *Atk.* 444, 446.—LORD CHANCELLOR [HARDWICKE]. Now the plaintiff is a daughter, and a child, and in this court considered in the nature of a creditor for the portion.

If that be so, what will be the effect of it in equity?

By the Master's state of the account, there are great arrears of the 500 *l. per ann.* jointure upon the wife, and likewise of the 80 *l. per ann.* maintenance for the plaintiff, almost a deficiency of 4000 *l.* which must run on as a burden upon the inheritance, and, as has been truly said, it must exhaust the inheritance, if the Dutchess of *Athol* should live to be very old, which, in the course of nature, she may do.

The Dutchess has two funds, real and personal assets, to answer her demands, the plaintiff has only one.

Is it not then the constant equity of this court that if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien.

Suppose a person, who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first; the court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons.

And therefore I am of opinion, that so far as will secure the plaintiff her 6000 *l.* fortune, she ought to be considered as a creditor, and intitled to turn the Dutchess upon the copyhold and personal estate.[1]

STEEL *v.* DIXON.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, 1881.

[*Law Reports,* 17 *Chancery Division* 825.]

Money was advanced to one *Robinson* on the security of a promissory note for £800, which *Dixon, Gurney, Steel,* and *Chater* signed as sureties. *Dixon* and *Gurney* consented to sign on condition only that special security be given them, and *Robinson* afterwards assigned property, his

[1] From another part of the opinion it appears that the estate in controversy here was part of that which was litigated in Frederick *v.* Frederick, 1721, 1 Peere Wms. 710, supra.

furniture, securing their share of money payable on the note. *Steel* and *Chater* had no knowledge of this arrangement. This deed was registered under the *Bills of Sale Act*. Each of the four sureties contributed equally to take up the note at the bank. Later *Dixon* and *Gurney* sold the furniture, realizing on it about £500. This action was brought by *Steel* and *Chater* who insisted that the Defendants were bound to account to them for the money so received.[1]

FRY, J.[2] In my opinion the Plaintiffs are entitled to share in the benefit secured by the deed to the Defendants. In coming to that conclusion, I base myself on the general principle applicable to co-sureties, as established by the well-known and often-cited case of Dering *v.* Earl of Winchelsea, 1 W. & T. L. C. 5th Ed. p. 106; 1 Cox 318, the short effect of which I take to be that, as between co-sureties, there is to be equality of the burden and of the benefit. When I say equality I do not mean necessarily equality in its simplest form, but what has been sometimes called proportionable equality. The result of that case was expressed by Baron *Alderson* in Pendlebury *v.* Walker, 4 Y. & C. Ex. p. 441; in these terms, that "where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety." I hold, therefore, that the result of Dering *v.* Earl of Winchelsea is to require that the ultimate burden, whatever it may be, is, as between co-sureties, to be borne by them in proportion to the shares of the debt for which they have made themselves responsible.

If that be the case, it follows that each surety must bring into hotchpot every benefit which he has received in respect of the suretyship which he undertook, and if he has received a benefit by way of indemnity from the principal debtor, it appears to me that he is bound, as between himself and his co-sureties, to bring that into hotchpot, in order that it may be ascertained what is the ultimate burden which the co-sureties have to bear, so that that ultimate burden may be distributed between them, equally or proportionably, as the case may require.

In coming to that conclusion, as I do upon principle, I am much strengthened by the American authorities to which my attention has been called by Mr. *Cookson*. Mr. Justice *Story*, in his Equity Jurisprudence, asserts the principle in these terms, 11*th Ed. pl.* 499: "Sureties are not only entitled to contribution from each other for moneys paid in dis-

[1] The statement of the case is abridged.

[2] The first paragraph of the opinion of the learned judge is omitted.

This is the venerable and learned judge, Sir Edward Fry, whose treatise on Specific Performance (*4th edit.*) is a standard authority on both sides of the Atlantic. It will be of interest to note that Sir Edward represented Great Britain in the recent Dogger Bank Incident between Great Britain and Russia (1905).

charge of their joint liabilities for the principal, but they are also entitled to the benefit of all securities which have been taken by any one of them to indemnify himself against such liabilities." And in the case of Miller *v.* Sawyer, 30 Vermont, 412, which was before the Court of Chancery in the State of *Vermont,* the principle is stated thus by Mr. Justice *Barrett,* the learned Judge who delivered the judgment of the Court. Having referred to Dering *v.* Earl of Winchelsea, 30 Vermont, 417, he said: "For present purposes it is needless to cite and discuss the books and cases to any considerable extent, in which this subject is treated, and the leading principles of it applied in settling the rights and duties of parties. It may be comprehensively stated, that persons subject to a common burden stand in their relation to each other upon a common ground of interest and right, and whatever relief, by way of indemnity, is furnished to either by him for whom the burden is assumed, enures equally to the relief of all the common associates;" and in the course of his judgment he refers, among other cases, to that of Hall *v.* Robinson, 8 Iredell, 56, in which Chief Justice *Ruffin* said: "The relief between co-sureties in equity proceeds upon the maxim that equality is equity, and that maxim is but a principle of the simplest natural justice. It is a plain corollary from it to that, when two or more embark in the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemnity or counter-security to any extent, it enures to the benefit of all. The risk and the relief ought to be co-extensive." These American decisions are, as it seems to me, exactly in point.

Mr. *North* has urged that a difference may arise where the security taken by one co-surety is taken by virtue of a bargain entered into between him and the principal debtor at the time of his becoming surety. In my judgment that is immaterial. I think it does not affect the principle of equity to which I have referred whether the security is the result of a contract with the debtor at the time when the co-surety becomes a surety, or is voluntarily given subsequently, or arises in any other manner whatever. I repeat, that whatever goes to diminish the total amount of the burden must, in my judgment, be brought into hotchpot.

In saying that, however, I wish to guard myself against its being supposed that this equity may not in any case be varied or departed from. Those to whose benefit the security enures may, of course, contract themselves out of the benefit, and the question may therefore well have to be considered in each case whether there has been such a contract between the co-sureties. But a contract between one surety and the debtor is not to be confounded with a contract between the co-sureties—a contract by which one co-surety renounces his equity in favour of another. In the next place, cases may arise in which one co-surety, by reason of his default in performing his duty towards the other, may estop himself from asserting the equity which he would otherwise have had against him. Some such cases have been suggested by Mr. *North* in the course of his

argument. But neither of those principles appears to me to apply in the present case, because here the contract upon which the security was given was made between the debtor and two of the co-sureties, and was not communicated at the time of their contract of suretyship to the other co-sureties, and there appears to me to be nothing in the conduct of the Plaintiffs (upon the assumption on which I am now proceeding) which can deprive them of the benefit of their right against the co-sureties. Therefore, on this assumption I hold that the Plaintiffs would be entitled to the benefit which they claim. It remains to be considered how far the assumptions are correct.

The question was then argued whether the deed of the 24th of February, 1879, was invalid as against the trustee in the liquidation.

FRY, J., held that the deed was valid as against the trustee, and that consequently the Plaintiffs were entitled to receive £200 from the Defendants *Dixon* and *Gurney*.

L.—EQUITY AIDS THE VIGILANT.

GODDARD *v.* GODDARD.

IN CHANCERY, 1640.

[1 *Reports in Chancery* 139.]

Bill of Review to reverse a Decree 22 *Jac.* the Plaintiff for Error says, the Cause was referred to Four Commissioners, and but Three certified; and also that the Lease, which the Plaintiff now insists on was not then in Issue, and the Plaintiff never consented to the Certificate.

This Court upon reading the Proofs, it appeared by Depositions of two Witnesses there was an Agreement for settling the Differences, and in regard the Decree was so long since and nothing done against the same in all this Time being 16 years, this Court would not reverse the Decree.

HOLLINGSHEAD'S CASE.

IN CHANCERY, BEFORE LORD CHANCELLOR MACCLESFIELD, 1721.

[1 *Peere Williams* 742.]

A. is partner with *B.* in the trade of a mercer. *A.* dies intestate, and *C.* his administrator brings a bill in equity against *B.* for an account of the partnership effects. Whereupon the cause is heard, and an account being decreed, the master makes a report, by which it appears, that

there is nothing due from the defendant to the plaintiff. *C.* takes exceptions to the master's report, and then dies, and the now plaintiff having taken out administration *de bonis non* of *A.* brought his bill of revivor to revive these proceedings.

The defendant pleads the statute of limitations, and that above six years had passed after the death of the first administrator and the plaintiff's taking out letters of administration, before the filing of the bill of revivor.

Lord Chancellor [MACCLESFIELD]: The statute of limitations speaks nothing of bills in equity, yet these are construed to be within it. The case of not reviving a decree which is only to account, is within all the mischief designed to be prevented, *viz.* to sue a man after his vouchers may have been lost, or his witnesses dead. For if the party may delay six years before he revives his bill, he may by the same reason forbear twenty-six, thirty-six or forty-six years. There can be no doubt but that if this were only a bill and answer, and the suit abated, the executor must bring his bill of revivor within six years, else the suit would be barred. Now the reason holds still as strongly in case of a decree to account, which is in nature of a judgment *quod computet;* where, if the plaintiff had died, his executor or administrator could not formerly carry it on, as now by the late statute he may; and though it may seem a material objection, that when there is a decree to account, the defendant as well as plaintiff may revive; it would however be very hard for equity to force a man to revive a suit against himself at the same time that he swears he owes nothing.

Therefore let the plaintiff amend his bill, and the defendant his answer, to bring the matter more fully before the court.

After which the defendant died, and one *Beecher* administering to him, the plaintiff brought another bill of revivor; whereupon the defendant *Beecher* pleaded the statute of limitations, and coming to be argued before lord chancellor *King* in *Mich.* 1727, his lordship disallowed the plea, saying that a bill of revivor after a decree to account, was in nature of a *sci. fa.* and not within or barrable by the statute of limitations; though the demand seemed to be a very stale one, and not to be countenanced.

HUET *v.* FLETCHER.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1739.

[1 *Atkyns* 467.]

The father of the plaintiff dies intestate, the mother possesses herself of all his personal estate, the son acquiesced for 40 years after the death of his father, and upon the mother's dying, accepts of a legacy under her

will, in value at least equal to two thirds of what his father left, and was contented for some time, but brings his bill now against the executor of the mother to account for all the personal estate of the father which came to her hands.

Lord Chancellor [HARDWICKE.] These are a sort of bills that deserve the utmost discouragement from this court, to oblige an executor to account for a personal estate, which, through the great length of time, he is utterly incapable of doing, besides too, a personal estate of a third person, and that did not belong to his testatrix, and where the plaintiff himself has also accepted of a legacy under the will of his mother, and acquiesced for a considerable time, and therefore to deter others from such frivolous and vexatious suits, I will dismiss the bill with costs.[1]

SMITH *v.* CLAY (1767) 1 *Bro. C. C.* 640 (*s. c.* 2 *Amb.* 645).—Lord Chancellor CAMDEN: This bill of review is between thirty and forty years after the decree pronounced.

There is a manifest error upon the face of the record.

The question upon this petition is, whether it is barred by length of time.

I am of opinion it is.

It would be an useless curiosity to trace backwards the origin of this proceeding.

It is at this time perfectly understood.

It is in nature of a writ of error, to reverse a decree, for error apparent upon the record.

This is the bill of review now before me, and to this my opinion shall be confined.

There are two questions.

First, What period of time is a bar to a bill of review?

Second, From what time this period shall be computed?

To the first question, the answer here is easy.

Twenty years is the period.

Edwards *v.* Carrol (5 Bro. P. C. 466), is decisive, and not now open to argument.

A court of equity, which is never active in relief against conscience, or

[1] Francis in his *Maxims*, p. 38, cites a number of earlier cases decided on this principle. Among them, the following may be noted: Winchcomb *v.* Hall (1630) 1 Rep. in Ch. 40 [after twenty years and two purchasers, the court will not examine if the ancestor was *non compos mentis*]; Coles *v.* Emerson (1635) *id.* 78 [a bond is conceived satisfied, it not being demanded in 22 years, and must be delivered up and cancelled]; Godfrey *v.* Thorn (1635) *id.* 88 [to the same effect the bond here being 23 years old]; Hales *v.* Hales (1637) *id.* 105 [a mortgage held unenforceable on which no demand had been made within forty years].

public convenience, has always refused its aid to stale demands, where the party slept upon his right and acquiesced for a great length of time.

Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.

Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this Court.

Therefore, in Fitter *v.* Lord Macclesfield, Lord North said, rightly, that though there was no limitation to a bill of review, yet, after twenty-two years, he would not reverse a decree but upon very apparent error.

"*Expedit reipublicæ ut sit finis litium,*" is a maxim that has prevailed in this Court in all times, without the help of an act of Parliament.

But, as the Court has no legislative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year; it was governed by circumstances.

But as often as Parliament had limited the time of actions and remedies to a certain period, in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity.

For when the legislature had fixed the time at law, it would have been preposterous for equity (which, by its own proper authority, always maintained a limitation) to countenance laches beyond the period that law had been confined to by Parliament.

And therefore, in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar.

Thus, the account of rents and profits, in a common case, shall not be carried beyond six years.

Nor shall redemption be allowed after twenty years' possession in a mortgagee.

Jenner and Tracey, 1731. (Marginal notes on 3 Will. 287.)

Same thing in Belch *v.* Harvey (ubi supra), adding, that the statute, having given ten years after disability, that ought to be observed.

By the like analogy, the House, in Edwards *v.* Carrol, determined that twenty years should bar a bill of review, because the statute of Wil. 3, had barred all writs of error after that period.[1]

[1] This extract of the opinion is taken from a foot-note in Belt's edition of Brown's Chancery Cases, p. 640. It is there said: "This note is from Lord Camden's own hand-writing in his notebook." The report in Ambler is much less satisfactory.

HOVENDEN *v.* ANNESLEY.

IN THE HIGH COURT OF CHANCERY, IRELAND, BEFORE LORD CHANCELLOR REDESDALE, 1806.

[2 *Schoales and Lefroy* *607.]

[The facts of the case are many and very much involved, but the essential points may be thus summarized: In the 11th year of his reign, King *Charles* I. granted certain estates in *Ireland* to one *Thomas Hovenden,* on whose death, 1641, they descended to his son *John. John,* a papist, taking part in the Rebellion, his lands were declared forfeited and they were granted by *Cromwell's* government to Major *William Walker.* Shortly after the Restoration, *Walker* granted all the estates to *Arthur Annesley,* taking back a lease for 99 years. Under *Charles'* declaration for the settlement of *Ireland, Thomas Hovenden,* son of *John,* the papist, made claim to a part of the estates, and the Commissioners declared in his favor. By royal grant, *Annesley* was later given another part. The sons of *William Walker,* the lessee, granted to the great grandfather of the defendant *Saunders* the balance of the 99-year lease. The other defendants are descended from the original *Annesley* to whom *Walker* granted. The plaintiff is descended from *Thomas Hovenden,* the innocent papist, who was let in after the Restoration, and claims under his will. The plaintiff seeks to have transferred to him the possession of the estates "on the ground of equitable rights vested in him arising out of legal rights, which he states to have belonged to those under whom he derives his title, and which legal rights have been affected by acts done by those persons, rendering the assertion of those rights impossible at law; and these acts of his ancestors affecting their legal rights are the foundation of the plaintiff's coming into a court of equity: for otherwise the claim would be wholly in law." The lower court dismissed the bill.]

LORD CHANCELLOR [REDESDALE]:[1] * * * The last consideration in this case is the simple effect of lapse of time; and this is very material in respect of various other cases as well as this. The old maxim of law is, *vigilantibus non dormientibus inservit lex.* People are not to sleep on their titles: it would be injurious to the public that they should. There must not be perpetual litigation on the subject of title; according to the maxim upon which Lord *Camden* acted in Smith *v.* Clay, 3 Bro. C. C. 639, *note, expedit reipublicæ ut sit finis litium.* Lands which are the subject of litigation, become waste for want of cultivation, and therefore it has been a fundamental law of state policy in all countries, and at all times, that there should be some limitation of time beyond which the

[1] Only so much of the opinion is given as deals with the question of laches in equity.

question of title should not be agitated. In this country the limitation has been fixed (except in writs of right, and writs depending on questions of mere title) at twenty years.

But it is said that courts of equity are not within the statute of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies: but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake in point of language, to say that courts of equity act merely *by analogy* to the statutes; they act in *obedience* to them. The statute of limitations, applying itself to certain legal remedies, for recovering the possession of lands, for recovering of debts, &c. Equity, which in all cases follows the law, acts on legal titles, and legal demands, according to matters of conscience which arise, and which do not admit of the ordinary legal remedies: nevertheless, in thus administering justice, according to the means afforded by a court of equity, it follows the law.

The true jurisdiction of courts of equity in such cases, is to carry into execution the principles of law, where the modes of remedy afforded by courts of law are not adequate to the purposes of justice, to supply a defect in the remedies afforded by courts of law. The law has appointed certain simple modes of proceeding, which are adapted to a great variety of cases; but there are cases, under peculiar circumstances and qualifications, to which, though the law gives the right, those modes of proceeding do not apply. I do not mean to say that, in the exercise of this jurisdiction, courts of equity may not, in some instances, have gone too far; though they have been generally more strict in modern times. So, courts of law, fancying that they had the means of administering full relief, have sometimes proceeded in cases which were formerly left to courts of equity: and, at one period, this also seems to have been carried too far.

I think, therefore, courts of equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include courts of equity; for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law, and, therefore, it must be taken to have virtually enacted in the same cases a limitation for courts of equity also.

This is, I think, established in a variety of cases, which prove that courts of equity have constantly acknowledged it to be the rule by which they are bound.

In Smith *v.* Clay, in Ambl. 645. (but of which a note is given in 3 Bro. C. C. 639. which I know was taken from Lord *Camden's* note book, where he had inserted it for the purpose of giving judgment, and the original of which I have seen in his own hand-writing, Lord *Camden* examined the whole question with that accuracy which peculiarly belonged to him.

The question was, whether a bill of review could be brought after twenty years: there was manifest error on the face of the record; yet Lord CAMDEN held it barred by length of time. A bill of review, founded on new evidence, (as, for instance, the concealment of a deed,) might give a new equitable jurisdiction; and therefore Lord CAMDEN carefully distinguished (See *Amb.* 647) such a case from that before him.

I have looked at a great number of cases for the purpose of seeing how far this rule has been adopted at different times; and I think it is impossible not to see that courts of equity have constantly guided themselves by this principle, that wherever the legislature has limited a period for law proceedings, equity will, in analogous cases, consider the equitable rights as bound by the same limitation.

In Hollingsworth's case, 1 P. Wms. 742, before Lord MACCLESFIELD, (an able judge both in law and equity, as ever sat on the bench,) there were exceptions to the master's report; one of the parties died; a bill of revivor was brought, and the statute of limitations pleaded. The decision of Lord MACCLESFIELD was in favour of the bill. "The statute of limitations speaks nothing of bills in equity; yet they are construed to be within it:" (that is, they are within it according to their nature.) However, he conceived that in that case there were circumstances, which, had they been brought before the court, would have taken the case out of the statute, and therefore he allowed both parties to amend. Upon the amended bill, there was another plea of the statute of limitations, and the case came before Lord KING, who disallowed the plea; saying that a bill of revivor, after a decree to account, was in the nature of a *scire facias,* and not within or barrable by the statute: so that he still proceeded on the same idea, that the statute was to be extended to courts of equity as well as courts of law, though the latter only are mentioned by the statute.

In Lockey *v.* Lockey, Prec. Ch. 518, the same doctrine occurs. "The Lord Chancellor was clearly of opinion that where one receives the profits of an infant's estate, and, six years after his coming of age, he brings a bill for an account, the statute of limitations is a bar to such suits, as it would be to an action of account at common law." That is also a case in which Lord MACCLESFIELD considered a court of equity barred as much as a court of law by the statute of limitations. He observed, that the trust which is supposed in a court of equity in a person who receives the profits of an infant's estate, is not a trust of that nature that the statute of limitations does not apply to. Now, I take it that the position which has been laid down, "that trust and fraud are not within the statute," is qualified just as he qualifies it here: that is, if a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust;* and if the only circumstance is, that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title: just as in the case of a lessee for years, though he does not pay his rent for 50 years, his possession is no bar to an ejectment after the expiration of this term, because his posses-

sion is according to the right of the party against whom he seeks to set it up. But the question of fraud is of a very different description; that is a case where a person who is in possession by virtue of that fraud is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree of a court of equity, founded on the fraud, and his possession in the mean time is adverse to the title of the person who impeaches the transaction, on the ground of fraud: and the decisions seem to have been in perfect conformity to that idea. With respect to the case of Booth *v.* Lord Warrington, 1 Bro. Parl. Cas. 455, it has been said, on the authority of that case, that length of time will not bar in case of fraud; but that is taken up without qualification, and without a just view of that case. The decision in that case was of this description; that as fraud is a secret thing, and may remain undiscovered for a length of time, during such time the statute of limitations shall not operate; because until discovery, the title to avoid it does not completely arise. That I take to be the true ground of the case of Booth *v.* Lord Warrington, where the house of lords held that the discovery of the fraud, being alleged to be at a subsequent period, and arising out of circumstances collateral, and it being established that such was the fact, a court of equity was well warranted in avoiding the transaction, notwithstanding the statute of limitations: for, pending the concealment of the fraud, the statute of limitations ought not in conscience to run; the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time: but after the discovery of the fact, imputed as fraud, the party has a right to avail himself of the statute; he has a right to say, "you shall not bring this matter into discussion after such a length of time, when it is only through your own neglect that you did not do so within the time limited by the statute."

This is a good deal illustrated in a case of Weston *v.* Cartwright, in a book of no great authority, Select Cases in Chancery, Sel. Cas. in Chancery, 34. 2 Eq. Abr. 10 pl. 11, the point appears more from the argument of counsel than from any decision that is reported. That was a case where Lord KING held that notwithstanding a fraud, the court, after a length of time, ought not to investigate the subject. It was insisted that the plaintiff's demand was barred by a length of time; he answered, that it was a case of fraud, and that the statute of limitations did not apply; and Booth and Lord Warrington was mentioned: but to this the reply was, that in that case there was a charge that the fraud was discovered within six years: and payment was decreed to one, though refused to the other.

In the South Sea Company *v.* Wymondsell, 3 P. Wms. 143, this point is discussed, and on the same ground; that in a bill impeaching accounts for fraud, it must be charged that the fraud was discovered within six years. "If the fraud was known and discovered above six years before exhibiting the bill, this, though a fraud, would be barred by the statute of limitations;" that is, the discovery of the fraud gave a jurisdiction to equity,

and a new right of action accrued at that time; and, therefore, if the plaintiff did not proceed within six years from that time, he ought to be barred.

Bicknell *v.* Gough, 3 Atk. 538. shows that Lord HARDWICKE thought the statute of limitations (if properly pleaded) might be pleaded in bar of a bill brought for relief, though not for discovery; because the very discovery sought might show that the right of action had accrued within the time. Lord HARDWICKE thought that the plea, if properly pleaded, would have been a good plea to a bill for relief on the ground of fraud, in conformity to the cases determined by Lord KING and Lord MACCLESFIELD.

This brings me to consider the case finally in another point of view. Supposing the plaintiff might have had relief on the ground of fraud, if he had pursued his title with due diligence, the answer is, it appears that the alleged fraud was discovered by the party at least so long ago, that in 1735 a bill was filed, (by Thomas Hovenden, the son of Walter, immediately on attaining full age, against Morley Saunders and others, impeaching the deed of 1726 as fraudulent, and praying to be decreed to the possession,) imputing the fraud, and impeaching the transaction on the same ground. Therefore, the position that fraud is not within the statute, because it is a secret thing, which cannot be discovered, is not applicable to this case; for the fraud imputed to this case is represented in the bill of 1735; that is, it is there stated that the release was a release which the party conceived he had a right to impeach on the ground of fraud, and for that purpose to obtain from the opposite party a discovery of all the facts and circumstances demonstrating the fraud. This was known to the person claiming in 1735. Therefore, whatever right of action might have accrued on discovering any particulars of the fraud different from what were apparent in 1726, must be taken to have accrued in 1735; but was not pursued in 1794, a period of near sixty years after the first bill filed. I hold it utterly impossible for the court to act in such a case. A court of equity is not to impeach a transaction on the ground of fraud, where the fact of the alleged fraud was within the knowledge of the party 60 years before. On the contrary, I think the rule has been so laid down, that every new right of action in equity that accrues to the party, whatever it may be, must be acted upon at the utmost within 20 years. Thus, in the case of redemption of a mortgage; if the mortgagee has been in possession for a great length of time, but has acknowledged that his possession was as mortgagee, and, therefore, liable to redemption, a right of action accrues upon that acknowledgment. But if not pursued within 20 years, it is like the case at law of a promise of payment beyond the six years, and *non assumpsit infra sex annos* pleaded: and so in every case of equitable title, (not being the case of a trustee, whose possession is consistent with the title of the claimant,) it must be pursued within 20 years after the title accrues. This was so considered by Lord CAMDEN, in Smith *v.* Clay, referring to Jenner *v.* Tracy, 3 P. Wms. 287. note (B): that the same length of time should bar a redemption that

would bar any other equity. In Floyer *v.* Lovington, 1 P. Wms. 270, it is laid down by Sir *Joseph Jekyll,* that as the statute of limitations had in the case of lands, after 20 years' possession, barred the plaintiff of his entry or ejectment, so the court of equity, in imitation of that law, would not allow the mortgagor to redeem the mortgage after the mortgagee had been 20 years in possession. It seems to me, therefore, that the statute of limitations would of itself be a complete bar to the relief sought in this bill, as it is impossible that any new right of action could have accrued since 1735.

In the case of Lord Deloraine *v.* Brown, 3 Bro. C. C. 633, an attempt was made to take advantage of the length of time by demurrer. The decision of that case, as reported by *Brown,* does not convey much satisfaction to my mind; and perhaps the note which follows will account for the judgment of the court being delivered somewhat in a hurry. (It was the last case decided by Lord THURLOW, before his resignation of the seals in *June,* 1792.) The first judgment, as reported, is hardly intelligible, and then there is an explanation given the next day: it is, however, rather contrary to what Lord KENYON determined at the Cockpit in Beckford *v.* Close, 3 Bro. C. C. 644. S. C. cited 4 Ves. jun. 476, which is cited in that case. This arose, perhaps, from Lord THURLOW'S not having, under the peculiar circumstances in which he stood, sufficiently considered that this was matter of the law of a court of equity; that is, a rule, which is to be considered as the law of a court of equity. Lord KENYON held, *Vide* 4 Ves, jun. 476, that a demurrer to a bill, because it did not show a good title to redemption within 20 years, was a good demurrer: Why? because it was the rule of the court that no redemption should be allowed after twenty years; and therefore the party should be put to bring his case by his bill within that rule. Lord THURLOW'S opinion was given in a hurry; and many cases were then pending, in which much injury might have arisen to the parties, if the judgments had not then been given: but it seems to me that Lord KENYON'S opinion is perfectly tenable on Lord THURLOW'S own qualification; that is, that when a party does not by his bill bring himself within the rule of the court, the other party may by demurrer, demand judgment whether he ought to be compelled to answer. If the case of the plaintiff, as stated in the bill, will not entitle him to a decree, the judgment of the court may be required by demurrer, whether the defendant ought to be compelled to answer the bill; that I take to be matter of the law of a court of equity, to be decided according to its rules and principles. However, it is clear that in this case of Lord Deloraine *v.* Brown, Lord THURLOW was anxious that his overruling the demurrer should not be considered as deciding upon the case; and the cause never came on again, Lord *Deloraine* being advised that the length of time was a bar.

This subject came again into consideration in Hercy *v.* Dinwoody, 4 Bro. C. C. 257: that was a case to which the statute of limitations could not be said *directly* to apply; for there was a decree to account; it was

not proceeded upon with effect; there was laches on all sides; it was a case, therefore, in which the court was to proceed according to its discretion, rather than according to any rule in analogy to the statute of limitations. Lord *Alvanley,* in deciding that case, was of opinion, on grounds of public policy, that he ought not to permit the account sought to be carried on, because the party who otherwise would have been entitled to it, had been guilty of such laches as to make it impossible to take the account fairly and justly. He did not say in that case what length of time would be sufficient to bar the claim, because it was a case so encumbered, that he conceived the court was to act according to its discretion: the statute was not pleaded, and all parties had slept upon their rights. The length of time during which the plaintiff in that case had slept, was from 1756 to 1790; and in this case the plaintiff has slept from 1726 to 1794, and clearly with full notice from 1735.

On these grounds I think it would be impossible for the court to interfere, though the rights of the plaintiff were ever so clear. It ought not to interfere, because I think this is a case to which the statute of limitations directly applies: but I think it ought not to interfere, even if the statute of limitations did not exist; and if the question depended merely on the discretion of the court. It never can be a sound discretion in the court to give relief to a person who has slept on his rights for such a length of time: for though it is said, and truly, that the plaintiffs in this suit, and those under whom they claim, were persons embarrassed and reduced by the fraud of others, yet the court cannot act upon such circumstances. If it did, there would be an end of all limitation of actions in the cases of distressed persons; for if relief might be given after twenty years, on the ground of such distress, so might it after thirty, forty or fifty; there would be no limitation whatever, and all property would be thrown into confusion. * * *

On these grounds, I think the bill ought to be dismissed. On the question of costs, I think I ought not to give costs against this unfortunate claimant, who certainly had a great colour of claim, and is, perhaps, barred only by length of time; especially as the principal defendants are persons of considerable fortune. As to Lord *Mulgrave,* I must give him his costs: I do not see why he is brought before the court: it is not to assist the plaintiff, but to dispute the title with the co-defendants, and to hold up the colour of his title to their prejudice. But he is clearly barred by length of time, and adverse possession, even if he had a right to claim under the title supposed by the bill.

ELLISON *v.* MOFFATT (1814) 1 Johns. Ch. 46, 48.—THE CHANCELLOR [KENT]: The parties lived in the same county, and, without accounting for the delay, the plaintiff suffered a period of 26 years to elapse, from the termination of the *American* war, to the time of filing his bill. The offer

made by the executors being for peace, and without any recognition of the justness of the demand, and being rejected by the plaintiff, cannot affect the question.

It would not be sound discretion to overhale accounts, in favour of a party who has slept on his rights for such a length of time; especially, against the representatives of the other party, who have no knowledge of the original transactions. It is against the principles of public policy, to require an account, after the plaintiff has been guilty of so great *laches*.

The bill must be dismissed on the ground of the staleness of the demand; but without costs.

CALHOUN *v.* MILLARD (1890) 121 N. Y. 69, 81.—[In 1872, the town of Andes, N. Y., issued to a railway company bonds, due in thirty years, in exchange for stock. These bonds were sold by the company, some of them coming into the hands of the defendants. For nine years a tax was levied by the town to keep up the interest on these bonds. The plaintiffs, taxpayers of the town of Andes, now bring this action asserting that the bonds are void, and asking that they be delivered up and cancelled. The action was brought within the statutory period of limitations in equitable actions.][1]: ANDREWS, J.[2] * * * It is and always has been the practice of courts of equity to remain inactive where a party seeking their interference has been guilty of unreasonable laches in making his application. (Story's Eq. Jur. § 1520.) The principle is stated with great force and clearness by Lord CAMDEN in Smith *v.* Clay (2 Ambl. 645): "Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing. *Laches* and neglect are discountenanced and, therefore, from the beginning of this court, there was always a limitation to suits in this court."

Courts of equity, it has been said, act not so much in analogy to, as in obedience to statutes of limitation of legal actions, because where the legal remedy is barred, the spirit of the statute bars the equitable remedy also.

In the present case, the cause of action for the cancellation of the bonds was not barred by the ten years' statute applicable to equitable actions. But a period of nine years had elapsed after the bonds were issued, before the commencement of the action. But we apprehend that the period of limitation of equitable actions, fixed by the statute, is not where a purely equitable remedy is invoked, equivalent to a legislative direction that no period short of that time shall be a bar to relief in any case, or precludes the court from denying relief in accordance with equitable principles for unreasonable delay, although the full period of ten years has not elapsed

[1] New York Code Civil Procedure § 388.

[2] Only a part of the opinion is printed.

since the cause of action accrued. The ten years' limitation was primarily designed to shield defendants (B. & N. Y. C. R. R. Co. Dudley, 14 N. Y. 352), and it must be true that a court, in the exercise of its equitable jurisdiction, could not entertain or enforce a cause of action barred by the statute, and not within any exception, acting upon any general equitable considerations. But, in enforcing purely equitable remedies, depending upon general equitable principles, unreasonable and inexcusable delay is an element in the plaintiff's case, which a court of equity always takes into consideration in exercising its discretion to grant or refuse relief, and is not a mere collateral incident. Where there is a remedy at law, whereby the plaintiff can prosecute or defend his legal right, the refusal of relief leaves the parties where they were. If there are special circumstances which may change the situation of the plaintiff to his injury, unless the equitable remedy is interposed, this fact may be considered. But the right of the court to deny relief upon equitable grounds, for long delay, although short of the statute period of limitation, is in the nature of a defense, and is not, we think, taken away by the statute. There may be a well-founded distinction between the case of an application for an equitable remedy in aid of, or to enforce a legal right not barred by the statute, and the case where an exclusively equitable remedy is sought, such as to restrain proceedings at law, or upon the principle *quia timet,* to deprive an adversary of the muniment of his alleged legal right, which he inequitably retains. In cases of the latter class, long delay or acquiescence, although short of the statute period for the limitation of equitable actions, may be a ground for refusing relief. (Pom. Eq. Jur. § 817.) The cancellation of securities is a purely equitable remedy, and cannot be claimed as an absolute right, nor is it applied for, or awarded in aid of a legal right or title.

We conclude, therefore, that it was within the power of the court to dismiss the complaint, so far as relief was sought for a cancellation of the bonds, on the ground of delay in bringing the action. The circumstances justified the conclusion on this branch of the case. The town and the taxpayers permitted the bonds to be dealt with and taken by savings banks and others for nearly ten years, not only without, so far as appears, a word of warning or protest, but by affirmative acts of recognition, encouraged investment therein as safe and valid securities. The bonds, resting on the adjudication of the county judge, were apparently valid. The legislature has still the power to ratify them and make them valid obligations of the town. (Williams *v.* Town of Duanesburgh, 66 N. Y. 129; Horton *v.* Town of Thompson, 71 id. 513; Rogers *v.* Stephens, 86 id. 623.) They are now in the hands of *bona fide* holders, that is, of persons who have paid value for them without notice. The fact that if the plaintiffs are defeated here, the bonds may be sued upon and enforced in another jurisdiction, constitutes no equitable reason for maintaining the action. (Town of Venice *v.* Woodruff, *supra.*)[1]

[1] And see Blake *v.* Gale, 1885, L. R. 31 Ch. Div. 196.

GREGORY *v.* GREGORY.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, 1815.

[*Cooper's Chancery Cases tempore Eldon* 201.]

William Gregory by Will duly executed, dated *February* 11, 1778, devised his freehold Estate in *Shalden*, subject to an Annuity of £10, to *William Gregory* his Son, and his freehold Estates in *Grewell* and *Upnately* (subject to an Annuity of £20, to *William Horner* and *Jane* his Wife for their Lives,) to his Son *James Gregory* and *Theophila* his Wife and his Friends *Lyon* and *Cross* and their Heirs, in Trust to receive the Rents and Profits until the youngest Child of *James Gregory* attained 21, and then as to the said Estate in *Shalden*, to sell and dispose thereof, and divide the Money among the then surviving Children of *James Gregory* and the Children of Testator's Son *John Gregory* deceased; and as to the Estates at *Grewell* and *Upnately*, to *James Gregory* for Life, and after his Decease the same to be also sold, and the Money to be equally divided amongst the said Testator's said Grand-children.

James Gregory as acting Trustee entered into the Possession of the said Estates, and continued so till his Death in 1793. In *July* 1793, shortly before his Death, *James Gregory* purchased of the three Children of *John Gregory* who were then all of Age their Shares and Interests under the said Will of their Grand-father at the Price of £250 each, being £750 for the whole, and by Indentures of Lease and Release dated *July* 11 and 12, 1793, in Consideration of £750, they conveyed their Estate and Interests in said Testator's real Estates to *James Gregory* for Life, and after his Decease to the Defendants in Fee who were *James Gregory's* Children. *James Gregory* dying on *December* 10, 1793, the Defendants took Possession of the said Estates.

The Bill filed by two of *John Gregory's* Children and the Representative of the third, charged that the Consideration for the said Conveyance was grossly inadequate, that the Plaintiffs were ignorant at the Time of the Value of their Interests, that *James Gregory* was at the Period in Question dangerously ill and died soon after, that the Plaintiffs were in indigent Circumstances, and that Advantage was taken of them.

The Prayer of the Bill was that the said Conveyance might be declared void and set aside.

It was proved on the Part of the Plaintiffs by *Hankin* a Surveyor that the whole of the said Estates were in 1793 worth £4800, and are now worth £6216. Another Witness confirmed the said Valuation; *James Gregory* was also proved at the Date of the said Transaction to have been in ill Health, having swoln Legs and a Complaint in his Chest, and that he never recovered. Several Witnesses deposed to the Circumstances of *John Gregory's* Sons in *July* 1793, as being indigent, one being a working

Watch-finisher, earning Ten and Sixpence to Twelve and Sixpence per Week, and another a Barber and Hair-dresser in a State of Poverty with three Children, and who had since gone to Sea; and that the Husband of the other Plaintiff who was the third Son, and is since deceased, was also in 1793 in the same Trade of a Barber and Hair-dresser, and his Wife obliged to take in Washing.

THE MASTER OF THE ROLLS. There are two Questions in this Case, 1st. Whether the Plaintiffs had originally a Ground for setting aside this Conveyance; and, 2dly. Whether the Lapse of Time which has taken Place is not a sufficient Bar. Now I think that if this Bill had been recently filed, the Plaintiffs would have had a Right to have had the Sale set aside. *James Gregory* the Purchaser was the acting Trustee from the Year 1778 to the Year 1793, and must therefore have acquired a complete Knowledge of the Situation and Value of the Estates. It is true the Bargain is made for the Benefit of himself and his Children. But the whole Transaction was managed by him only. He chooses that the Form of Transfer shall be to himself and his Children. In Principle it must be the same, whether the Estates were purchased by him for himself and his Children, or for himself alone; and the Danger must be as great to permit a Trustee to purchase in the Name of himself and his Children, as in his own Name. It is clear that he was not discharged at the Time of his Purchase from his Situation of Trustee. As to Inadequacy of Price, one listens with great Reluctance to Evidence upon that Subject given, after a great Distance of Time from the Date of the Transaction. It is difficult for Surveyors afterwards to say what was then the Value of an Estate. It is however pretty clearly made out that there was Inadequacy of Price in this Case. If therefore the Purchase had been recent, I am of Opinion that it ought to have been set aside. Then as to the Length of Time which has elapsed, I do not see any Evidence of Fraud or Circumvention in this Case. Can it then be said that there is no Distance of Time at which Circumstances originally entitling a Party to Relief may be considered as waved or abandoned? Certainly there may. It is only a Rule of Equity, that a Trustee shall not purchase. In all the Cases in which Length of Time has not been allowed to operate against the Title to Relief, it has been shewn that there has been a Continuance of the Circumstances under which the Transaction first took Place, as of the Distress of the Parties, or of the improper Influence used, or of some other Circumstance. Here the Parties were independent of the Purchaser, or of his Bounty. They had also the Opportunity of objecting early to the Sale. The only Circumstance alleged in Answer to this is their Poverty, which is proved to have been the Fact at the Time of the Purchase. But the Evidence as to that stops at the year 1793, and does not in the least shew any Continuance of Distress. Can it then be said that eighteen Years which have since elapsed can go for Nothing? In Bonny *v.* Ridgard, a MS. Case cited by the Master of the Rolls, in Hill *v.* Simpson, 7 Ves. 167, a Case before Lord *Kenyon,* he dismissed the Bill

merely upon the Lapse of Time, though he thought that it was a Transaction in which if recent the Court would have granted Relief. There would be no Security for Men's Rights if it were otherwise. Upon the Ground of Length of Time therefore, the Bill in this Case must be dismissed; but it being upon that Ground only, it must be dismissed without Costs.[1]

UNITED STATES *v.* KIRKPATRICK.

IN THE SUPREME COURT OF THE UNITED STATES, 1824.

[9 *Wheaton* 720.]

In 1813, one S. M. Reed was appointed a collector of direct taxes and internal revenue. The defendants were sureties in his official bond, conditioned for the true and faithful performance of the duties of the office. One of these duties was the filing of quarterly reports with the Comptroller of the Treasury, and if such reports were not filed, the latter official was bound by law immediately to issue warrants of distress against the negligent officer. From 1814 to 1818, Reed did not properly report and the distress warrants were not issued against him. His sureties being now sued on the bond, they set up the *laches* of the government.[2]

Mr. Justice STORY[3] delivered the opinion of the court.[4]

Then, as to the point of *laches*, we are of opinion, that the charge of the court below, which supposes that *laches* will discharge the bond, cannot be maintained as law. The general principle is, that *laches* is not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scat-

[1] "Then as to trusts being an exception to the statute of limitations: The rule holds only as between trustees and *cestui que* trusts. It is true that a *cestui que* cannot set it up against his *cestui que* trust: but this is merely the case of a trustee by implication, and as such affected by an equity; but that equity must be pursued within some reasonable time. Both courts of law and equity preserve an analogy to the statute of limitations." Per Lord Commissioner ASHURST in Townshend *v.* Townshend, 1783, 1 Bro. C. C. 550, 554.

[2] A substituted statement of facts.

[3] "The writings of Story are cited as authority in Westminster Hall, and Lord CAMPBELL, in alluding to them in a debate in the House of Lords, spoke of their author as 'greater than any law writer of which England could boast since the days of Blackstone.'"—Speech on motion of thanks to Lord ASHBURTON, 7th Apr. 1847.

[4] Only so much of the opinion as relates to the laches of the government is given.

tered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of *laches* can be applied to its transactions. It would, in effect, work a repeal of all its securities. On the other hand, the mischiefs to the agents and their sureties would be scarcely less tolerable. For if, where the laws, as in the present instance, require quarterly accounts and settlements, a mere omission to account is to be deemed a breach of the bond, for which a suit must be immediately brought, upon the peril of loss from imputed *laches;* the collector and their sureties would be oppressed with the most expensive and vexatious litigation; and their whole real estate, which by law is subjected to a lien, upon the commencement of a suit, would be perpetually embarrassed in its transfers. This consideration of public or private inconvenience, is not to overrule the settled principles of law, but it is certainly entitled to great weight, where a new doctrine is to be promulgated. It is admitted, that mere *laches,* unaccompanied with fraud, forms no discharge of a contract of this nature, between private individuals. Such is the clear result of the authorities. Why, then, should a more rigid principle be applied to the government? a principle which is at war with the general indulgence allowed to its rights, which are ordinarily protected from the bars arising from length of time and negligence?

It is said, that the laws require, that settlements should be made at short and stated periods; and that the sureties have a right to look to this as their security. But these provisions of the law are created by the government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the surety. The surety may place confidence in the agents of the government, and rely on their fidelity in office; but he has of this the same means of judgment as the government itself; and the latter does not undertake to guaranty such fidelity. No case has been cited at the bar, in support of the doctrine, except that of People *v.* Jansen, 7 Johns. 332. In respect to that case, it may be observed, that it is distinguishable from the present in some of its leading circumstances. But if it were not, we are not prepared to yield to its authority. It is encountered by other authorities, which have been cited at the bar; and the total silence in the English books, in a case of so frequent occurrence, affords strong reason to believe, that it never has been supposed, that *laches* would be fatal in the case of the government, where it would not affect private persons. Without going more at large into this question, we are of opinion, that the mere *laches* of the public officers constitutes no ground of discharge, in the present case.[1]

[1] "These two cases [the principal case and *U. S.* v. *Vanzandt* (1826) 11 *Wheat.* 184] seem to fix the principle, that the laches of the officers of the government, however gross, do not of themselves discharge the sureties in an official bond, from the obligation it creates; as firmly as the decisions of this court can fix it." Per Chief Justice MARSHALL in Dox *v.* Postmaster-General, 1828, 1 Peters 318, 326.

ALLFREY *v.* ALLFREY.

IN CHANCERY, BEFORE LORD COTTENHAM, 1849.

[1 *Macnaughten and Gordon* 87.]

The LORD CHANCELLOR [COTTENHAM]:[1] . . . Now in the present case there is no question about the fraud. It is as clear a case of fraud almost as can be stated; and without going through any great number of the instances of fraud, the one with regard to the stock is perfectly conclusive. In the first place, what is it that constitutes the approval of the dealing with the stock? It is the signing of the memorandum, in the handwriting it is true of the Plaintiff, but it is quite obvious that it must have been done under the dictation of the party taking the benefit of that memorandum. The Plaintiff signs a memorandum, which states that he had had a satisfactory investigation of the account, and of the administration account of the effects of his parent, both parties claiming under the parent; but, the uncle having obtained administration, it must never be forgotten, under a false oath, under a most distinct, direct, and most inexcusable perjury, because there could be no misapprehension. The intestate having left a wife and children, his brother goes to the Ecclesiastical Court, and swears that he is the only next of kin, or the nearest next of kin, which entirely excludes all the family, his nephews and nieces, of whose existence of course he must have known; and he, deliberately swearing that there were no such persons in existence, obtains administration of the father's estate. A more distinct and palpable perjury cannot be stated; and that is the commencement of the transactions which have led to this litigation. Now, what the Defendants set up as a bar to the Plaintiff's relief in asking for an account of his father's estate, is, that he, the youngest son, not long after he became of age—about two years after he became of age—signed a memorandum, stating that he had had a satisfactory investigation of the account, and of the administration account of the effects of his parent. Now, it is that very account which contains the fraud. Then, according to the facts as they stand, what is it that constitutes a settlement, and where is the bar to the Plaintiff, to prevent him from having the relief which he prays? Is the statement true? Is that a satisfactory account? Could he have had a satisfactory investigation of that account, or could he have had a satisfactory investigation of the account of the administration of the effects of his parent? Why, this one fact—and one fact is quite sufficient for the present purpose—appears, in regard to that account, coupled now with the admitted fact, which is not to be found in that account, that the

[1] There have been omitted the statement of facts (sufficient appearing in the opinion) and a part of the opinion which discusses the difference between a decree for an open account generally (which the court here allows) and a decree to surcharge and falsify.

father left a sum of 9100*l.*, 3*l.* per cent. stock. It is now not in dispute: it is either admitted, or so proved that no contest is raised at the bar on the subject, that, in the year 1802, his brother, having so obtained administration, sold out 4000*l.* of that stock, and had the rest transferred into his own name. Of that transaction not a vestige is to be found in the account of which this young man states that he had had a satisfactory investigation; but entries are made in it, in the year 1808, six years after this transaction, as if the stock had been then sold, and other stock purchased. Now the plaintiff knew nothing, and still knows nothing of these entries, except so far as they appear in the account. He has been desirous of ascertaining what the real transaction was, and has applied to the bank for that purpose. The bank returns the obvious answer, that, it being the private account of the uncle, they are not in the habit of informing others of the state of such an account, without the leave of the party whose account it is, and that leave they have not been able to obtain. We therefore have these facts; that there was a sale by the uncle of 9100*l.* stock, or a transfer to himself, which is the same thing, of that portion of the intestate's estate in the year 1802; that no entry was made in the account of that transaction at the time when it took place. The account, therefore, is false in that particular. There is an omission, a wilful and culpable omission, at that time; and in the year 1808, there is an entry inconsistent with the facts as they really occurred, because it represents the stock so sold or transferred in 1802 as remaining in 1808. So far we know it to be false, because it is necessarily false from the fact which is proved as to the transaction in 1802. Whether any one stock was bought, when it was alleged to have been bought, or what the transactions were with regard to that stock, is not before the Court, by the interposition of those who now represent the uncle's estate. We have from this account an omission of what took place in 1802, and a false entry in 1808,—a misrepresentation, a falsification of the real transaction,—and therefore a fraudulent statement of account, of which the uncle gets the nephew to sign a memorandum, that he had had a satisfactory investigation, as well as of the administration account of the parent's estate. Now, then, this memorandum, or rather this account, so proved to be false, so proved to have been obtained by misrepresentation and fraud, is of necessity set aside; and it is set aside on the well established fact of a fraud having been practiced by this personal representative, also standing in the place of a parent, because he had placed himself in the position of one standing in *loco parentis* with regard to this family. He had acted as their uncle, and in many respects had acted kindly, but so far disqualified himself in settling the account, that, as between himself and them, he had assumed the character of a person acting in *loco parentis*. We have, therefore, a party acting in *loco parentis* exhibiting a falsified account, and getting his nephew to sign that false account, representing that he had had a satisfactory investigation of it. Why, on the face of the account, he might have had a

satisfactory investigation of it, because the account itself necessarily did not contain a statement, and least of all, proof of errors; therefore he may have investigated the account, but nobody could have discovered the fraud, or the omission, from the mere investigation of that account. The young man, however, had been deceived; the whole transaction had been mystified and misrepresented; and the party, who was entitled to have, as he states he had had, a satisfactory investigation of the administration account, as well as the account he signed, expressed his approval necessarily in ignorance of the fraud, which had been practiced upon him. That transaction, therefore, is most properly, by the decree of the Master of the Rolls, set aside. Now what possible security can the Court have, or can the Plaintiff have, that, in pursuing this enquiry, and endeavouring to shew in what other respects he may have been in a similar manner defrauded, he (the Plaintiff) has the materials to enable him to bring before the Master any other case of fraud? It may exist; it may be covered by some false entry; and, if he could find it out, and have the means of proving it, he might be relieved under a decree to surcharge and falsify. But is it not rather the duty of those who rely upon the account, who represent the party who made the account, who stand in the place of the author of the fraud, to substantiate and prove the actual state of the account, than to throw that burden on the party complaining, and who may with justice complain, of his having been deceived and defrauded in the ostensible settlement that took place. No doubt it may produce hardship; it is impossible to deny that, after the great length of time, which I say nothing upon, because, when fraud is so distinctly established, time becomes perfectly immaterial. The Plaintiff, not having the means of discovering the fraud, did not in fact discover it until within a comparatively recent period.

Under these circumstances, difficulties may, beyond all doubt, arise in passing the account. The Master of the Rolls has, however, adopted a plan, which has also been pursued in a great many recent cases, and which, in a degree, applies a remedy to the possible evil, arising from a loss of documents, or of evidence, from lapse of time. He has given the Master directions, that, if he finds a difficulty in taking the account, owing to the length of time that has elapsed, or to the loss of documents, he is to state specially the difficulty, which he finds, on circumstances that appear before him on that subject. The Court, then, according to the facts that appear on the Master's report, may be in a situation to apply such remedy, and give such further directions, as the circumstances of the case may require, which, in a great degree, guards against the possibility of injustice being done even to an offending party; and I think it affords all the protection, which the party so offending is entitled to, or can in justice be allowed, in a decree between himself and the party so defrauded. I therefore approve of the decision of the Master of the Rolls in every part, and dismiss this appeal with costs.[1]

[1] "The next question is in effect, whether delay will purge a fraud? Never

while I sit here. Every delay arising from it adds to the injustice, and multiplies the oppression." Per Lord Chancellor NORTHINGTON in Alden *v.* Gregory, 1764, 2 Eden 280, 285.

"No length of time will bar a fraud." Per Lord Chancellor TALBOT in Cotterell *v.* Purchase, 1734, Forrester 61, 63.

The maxims treated by the cases printed are not all that have been recognized, but it is believed they are all that are fundamental. Among those not treated, the following are noted by Francis in his Maxims of Equity, "It is equity that should have satisfaction which sustained the loss." "It is equity that should make satisfaction, which received the benefit." Neither of these is found in recent works, and the principles involved in them seem easy, if not indeed necessary, deductions from those considered. His maxim, "Equity will not suffer a double satisfaction to be taken," is covered by the cases in the text under, "Equity imputes an intent." Three others, "Equity relieves against accident." "Equity prevents mischiefs," and "Equity prevents multiplicity of suits," express principles that are now recognized rather as distinct, well defined occasions for the assumption of jurisdiction by the courts of equity than as principles controlling the exercise of a jurisdiction already acquired. They are treated from this standpoint in the body of the work. His one other maxim not illustrated in the text is "Equity suffers not advantage to be taken of a penalty or forfeiture where compensation can be made." This likewise is treated later, as belonging rather to equitable rights. Bispham, in his Principles of Equity, gives still another maxim, "Equity acts specifically." But this also seems rather a ground for taking jurisdiction than a general principle controlling its exercise. The principle has already received treatment under the section "Grounds of Equity Jurisdiction," supra.

In addition to the collection of maxims in the standard works on equity, the student will find of interest and value Hening's Maxims, a book in which is reprinted the works of Noy, Francis, and Branch.

Lord KAMES, at the end of his two-volume work on the *Principles of Equity,* announced the following general principles under the title prefixed:

PRINCIPLES FOUNDED ON IN THIS WORK.

A man who is innocent is not liable to repair any hurt done by him.

When there is a right, some court must be empowered to make it effectual.

For every wrong there ought to be a remedy.

No interest of mine, not even the preservation of life itself, authorizes me to do any mischief to an innocent person.

Every man may prosecute his own right without regarding any indirect or consequential damage that another may suffer.

Justice will not permit a man to exercise his right where his intention is solely to hurt another.

An action at law will not be sustained if the plaintiff cannot show that it will benefit him.

It is an immoral act to strip people of their property by throwing a strong temptation in their way.

He that demands equity must give equity.

Equity holds a deed to be granted where it ought to be granted.

One is permitted to take advantage of another's error *in damno evitando*, not *in lucro captando*.

No man is entitled to the aid of a court of equity when that aid becomes necessary by his own fault.

No person, however innocent, ought to take advantage of a tortious act by which another is hurt.

A man ought not to take advantage of an improvement or reparation made upon a common subject without refunding part of the expense, in proportion to the benefit he has received.

A thought retained within the mind cannot have the effect to qualify an obligation more than to create it.

To bind a man by words beyond consent is repugnant to justice.

He who wills the end is understood to will the means proper for accomplishing the end.

A person honoured in a deed can take no benefit by it if he counteract the declared will of the grantor.

A man who has committed no fault cannot be deprived of his property.

No person is bound to fulfill an obligation that answers not the end purposed by it.

Cujus commodum ejus debet esse incommodum.

Every crime against the law of nature may be punished at the discretion of the judge when the legislature has not appointed a particular punishment.

A case out of the mischief is out of the meaning of the law, though it be within the letter.

No man is permitted to take advantage of a defect in evidence when that defect is occasioned by his fraud.

Portior debet esse conditio ejus qui certat de damno evitando, quam ejus qui certat de lucro captando.

It is unjust to demand from the debtor privately, or even by legal execution, any subject that he is bound to convey to another.

No man is suffered to take benefit by his own fraud or wrong.

No man is suffered to make a defence contrary to conscience more than to make a claim.

Frustra petis quod mox es reflituturus.

The motive of preventing loss will not justify an unjust act or the being accessory to it.

These principles are printed at end of volume one of *Fonblanque's Equity.*

CHAPTER V.

EQUITABLE RIGHTS.

Section 1. Accident.

WILLIAM SYSEL'S CASE.

In Chancery, before Lord Chancellor Edmund de Stafford, 1398-1403.

[*Select Cases in Chancery,* 10 *Selden Society, No.* 39.] [1]

To the most honourable and most reverend Lord and Father in God, the Bishop of Exeter and Chancellor of England,
Beseecheth William Sysel, one of the lieges of our Lord the King, that whereas lately John Burdeyn, Prior of Leighs in the county of Essex, by his writing indented, and with the assent of his convent, granted to the said suppliant a corrody,[2] to be taken yearly in the said Priory, as in certain indentures between the said Prior and the said suppliant was more fully contained; of which corrody the said suppliant was peaceably possessed, by virtue of the said grant, until the Thursday after the Purification of our Lady in the 21st year of our Lord the King [1398], when certain persons, with the assent of the said Prior, entered the house of the said William within the said Priory against his consent and will, and broke the said house, and, with force and arms, took and carried off the deeds, evidences, and other muniments touching the said corrody and other debts between the suppliant and the said Prior, by [the direction of?] the said Prior; whereby the said suppliant is

[1] In his arrangement of cases under the heading "Principles and Growth of Equity," the editor of "Select Pleas in Chancery," Mr. William Paley Baildon, has grouped this case under "Accident." His note to the case itself reads: "No equitable doctrine appears in this case, unless *discovery* is implied in the prayer. *Specific performance* is not asked for, although it might have been expected."

[2] A right to certain allowances of food, and sometimes lodging and raiment; they were common in most English monasteries, and were frequently commuted for a money payment.

ruined, and [hath] lost the substance of his living: May it please your most gracious Lordship to grant a writ of our most redoubted Lord the King directed to the said Prior [commanding him] to be before you in the Chancery on the quindene of Trinity next to come, to answer to this matter, and according to what is found by examination or by averment, to do what right, law and good faith demand; For God and in way of Charity.[1]

KOPPER *v.* DYER (1887), 59, Vt. 477, 482.—ROWELL, J. Kopper seeks relief on the ground of accident. That chancery may grant relief on that ground in cases of this kind cannot be doubted; and the first question that arises is, Has the orator made a case that calls for the interposition of the court in his behalf?

The term *accident*, in its legal signification, is difficult to define. Judge STORY defines it as embracing "not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct in the party" affected thereby. 1 Story Eq. s. 78. Mr. Pomeroy justly criticises this definition as including what are not accidents at all but mistakes, and as omitting the very central element of the equitable conception, and defines it thus: "Accident is an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter per-

[1] "Touching the affirmative part, what matters are relievable in the chancery, I have heard they must be one of these kinds, viz. matters of fraud, trust, extremity, or casualty; or else not lightly to be dealt in here. For almost all others besides these do arise from the remiss, careless, and negligent dealings of men, who having precipitated themselves into some great inconveniences, come with open mouths into the chancery seeking relief; wherein how far they shall be thought fit to be holpen, I will not presume to determine."—Hargrave Law Tracts, 431.

"Three things are to be judged in court of conscience: covin, accident, and breach of confidence.

"All covins, frauds, and deceits, for the which there is no remedy by the ordinary courts of law.

"Accident, as when a servant of an obligor, mortgagor, &c. is sent to pay the sum on the same day, and he is robbed &c., remedy is to be had in this court against the forfeiture, and so in the like.

"The third is a breach of trust and confidence, whereof you have plentiful authorities in our books."—4 *Co.* Inst. 84.

son, under the circumstances, to retain." 2 Pomeroy Eq. s. 823, n. 1. And the chief point of the thing is, that because of the unforeseen and unexpected character of the occurrence by which the legal relation of the parties has been unintentionally changed, the party injuriously affected thereby is in good conscience entitled to relief that will restore those relations to their original character, and place him in his former position. Ib. s. 824. But, as a general rule, relief will not be granted unless it can be done with justice to the other party; for if he cannot be put in as good a situation as he would have been in had the other party performed, the court would not interpose. Rose *v.* Rose, Amb. 331.[1]

Equity in many instances relieves against forfeitures occasioned by the non-payment of money at a day certain; and this, although there is no accident, but negligence instead; on the ground that the condition and the forfeiture are regarded as merely security for the payment of the money. This is the ground on which tenants are relieved from forfeitures for the non-payment of rent as stipulated, and mortgagors are allowed to redeem after the law-day has passed. And although the agreement is not wholly pecuniary nor measured by pecuniary compensation, still, if the party bound by it has been prevented by accident without his fault from an exact fulfillment, so that a forfeiture is thereby incurred, equity will interpose and relieve him from the forfeiture, upon

[1] Story's definition of accident is adopted by H. A. Smith in his Principles of Equity, 232.

The term is defined by Jeremy, Equity Jurisdiction, 358, as "an occurrence in relation to a contract which was not anticipated by the parties when the same was entered into, and which gives an undue advantage to one of them over the others in a court of law." Story criticises this expression, saying: "Accidents, in the sense of a court of equity, may arise in relation to other things besides contracts, and therefore the confining of the definition to contracts is not entirely accurate. The definition is defective in another respect; for it does not exclude cases of unanticipated occurrences, resulting from the negligence or misconduct of the party seeking relief." The same author criticises the definition of Lord Chancellor Cowper that "by accident is meant when a case is distinguished from others of the like nature by unusual circumstances," [Earl of Bath *v.* Sherwin (1710) 10 Mod. 1] which is pronounced "quite too loose and inaccurate, without some further qualifications; for it is entirely consistent with the language, that the unusual circumstances may have resulted from the party's own gross negligence, folly, or rashness."—1 Equity Jurisprudence, 87, n. 1, and 88. Pomeroy states that the definition "is so imperfect and inaccurate as to be entirely worthless." Equity Jurisprudence, § 823, n. 1.

Josiah W. Smith, in his Manual of Equity Jurisprudence, 28, gives the following: "Accident, as remediable in Equity, may be defined to be an unforeseen and injurious occurrence, not attributable to mistake, neglect, or misconduct." Mr. Bispham says this "seems to be both accurate and comprehensive."—Principles of Equity, § 174.

Spence remarks, "Every attempt to define accident in its judicial acceptation, even in modern times, has failed."—Jurisdiction of Court of Chancery, 628.

his making compensation, if necessary, or doing everything else in his power to satisfy the equitable rights of the other party. 2 Pomeroy Eq. s. 833.

In Cage *v.* Russell, 2 Vent. 352, it is laid down as a standing rule of equity that a forfeiture shall not bind when the thing can be done afterwards, or any compensation can be made for it. Forfeitures are odious, and courts struggle against them; and relief is granted for the nonperformance of divers collateral acts whereby they are incurred; as, for not laying out a specific sum in repairs in a given time—Sanders *v.* Pope, 12 Ves. 282; for cutting down timber when covenanted against—Northcote *v.* Duke, Amb. 511; for not renewing a lease in time—Rawstorne *v.* Bentley, 4 Bro. C. C. [*415]: and the like. Relief is also granted against forfeitures incurred by unintentional breaches of the condition of mortgages for support, on terms that the party in fault fully compensate and indemnify the other party for all he has lost by reason of the breach. Henry *v.* Tupper, 29 Vt. 358.

In Adams *v.* Haskell, 10 Wis. 123, the defendants were prevented by accident from reaching the place of a foreclosure sale until after it was completed, and the court for that reason ordered a resale, but on terms.

In Pierson *v.* Clayes, 15 Vt. 93, the orator, by reason of pending negotiations of settlement, without negligence on his part, let the time of redemption expire; and he was relieved by opening the decree and giving further time to redeem.

The case of Bostwick *v.* Stiles, 35 Conn. 195, is confessedly much in point. That was a bill to open a decree of foreclosure and obtain further time. The mortgage debt was about $4,000, and the value of the premises twice that sum. The time limited for payment was August 5th. The petitioner intended to redeem, but not having sufficient means of his own, he applied to his uncle—a man of property—to help him, and he agreed to, and to furnish the money on August 3d, on which the petitioner relied; but for some reason not explained he did not furnish the money as agreed, and the petitioner delayed making other arrangements until the evening of August 5th, when he applied to Russell for assistance. Russell had no money, but plenty of government bonds, and agreed to make payment in them if defendant would take them, and accordingly went to defendant's house that evening after defendant had gone to bed, and told his wife that he had come prepared to redeem the mortgage for the petitioner, but defendant did not get up, but sent word by his wife that he was sick, and Russell went away. On this state of facts the court held that the petitioner's failure to pay on August 5th was occasioned by accident, without fault or neglect on his part, and that the accident lay in the fact of his uncle's failure to furnish the money as agreed, and as the petitioner had reason to believe he would. The court says that there is a degree of uncertainty in regard to all business expectations, and that no more ought to be required in respect of future obligations imposed by law than that such means shall be taken to fulfill them as will render

it reasonably certain, as far as human sagacity can foresee, that they will be performed.

It is common in England to enlarge the time of redemption on application before the day of payment; and though the indulgence is not granted of course, it is said not to require a very strong case to obtain it. And the time may be enlarged more than once. Thus, in Jones *v.* Creswicke, 9 Sim. 304, after the time had been enlarged, and after the order absolute had been made though not drawn up, the time was again enlarged, on the ground that the man who had agreed to lend the defendant the money was prevented by illness from going up to London on the day it was due, and his wife, whom he had deputed to carry it up, was prevented from doing so because the London coach was full the day before. And see Edwards *v.* Cunliffe, 1 Madd. 287.

And the decree may be opened after the order absolute has been made and enrolled. Thus, in Ford *v.* Wastell, 6 Hare, 229, notwithstanding the order absolute had been drawn up and enrolled, the decree was opened because all the plaintiff's property was involved in an administration suit that she was justified in believing would terminate in season to enable her to avail herself of her property with which to meet the payment, but which had not yet terminated. See also Thornhill *v.* Manning, 1 Sim. N. S. 451, in which the promptness of the mortgagor in applying was regarded as the great and important feature in the case to guide the court in deciding what it ought to do.

ANONYMOUS.

In the Court of Common Pleas, 1536-37.

[*Dyer* 33a.]

A lease for years was made of a meadow by which the river Exe runs, by deed indented; and the lessee covenanted to sustain and repair the banks to prevent the water from overflowing, upon pain of forfeiture of ten pounds. And afterwards, by reason of a great, outrageous, and sudden flood, which happened lately by reason of the subversion of the weirs in Devonshire, the banks were decayed and perished, &c. And by the opinion of Fitzherbert and Shelley the law is, that the lessee is excused from the penalty; as if it were of an house which is burnt by lightning, or overturned by the wind, because it is the act of God, which cannot be refitted; but still he is bound to make and repair the thing in convenient time, because of his own covenant.[1]

[1] In Atkinson *v.* Harman, 1553-58, 1 Calends. cxlii. (a case on all fours

ROWLES *v.* ROWLES.

IN CHANCERY, 1579-80.

[*Cary* 111.]

The plainant desireth to be relieved against an obligation of one hundred pounds, which had an intricate and insensible condition put in suit, for that the plainant, being desired by the defendant to seal a release, desired only time to be advised thereof, which the defendant would not yield unto, but hath put the bond in suit, though no ways damnified; and now the plainant is ready to seal the release; therefore an injunction is granted.

UNDERWOOD *v.* SWAIN.

IN CHANCERY, 1649.

[1 *Reports in Chancery* 161.]

The Case is, That *Philip Swain* being seized in Fee of the Lands in question, by Will devised the same to *John Swain* of *Langston* his Kinsman and his Heirs, in consideration that he should pay all his Debts and Legacies, by which Will the said *Philip* appointed his

with the principal case) the plaintiff filed his bill in Chancery asking relief from a deed by the terms of which he was bound, under penalty, to keep in repair certain banks, thus confining the water from the Thames. The bill set forth that the banks were so washed out by sudden and heavy rains, that the keeping of them in repair was impossible. Both the answer and the replication are given, but no endorsement. The disposition made of the case is therefore uncertain.

Mr. Spence says: "The cases in which the Court of Chancery was first called upon to exercise this jurisdiction [founded on accident], so far as we can collect, was in the instance of penalties and forfeitures."—Jurisdiction of Court of Chancery, 628.

"It has sometimes been said by writers that this entire jurisdiction over penalties and forfeitures is based upon accident. It may be true that, in the earliest period of equity, the chancellors referred cases of relief against penalties to the general head of accident; but to explain the whole jurisdiction as now administered by treating it as based on accident, is to disregard the plain facts and meaning of words."—Pomeroy, Equity Jurisdiction, § 833, n. 1.

Again Mr. Spence says: "In the reign of Philip and Mary, we find bills filed to be relieved from penalties, expressly on the ground of accident, as where a person was bound to repair the banks of a river within a given time,

Legacies to be paid within two Months after the death of *Sibil* his *Wife,* who had an Estate in the Premises for her Life, and lived about 12 years after the death of the said *Philip,* and in the mean time married the Plaintiff *Underwood,* who having an Estate in right of his said Wife for her Life, purchased the Reversion thereof after the death of the said *John Swain* of *Langston* of *John Swain* the Son and Heir of the said *John Swain* of *Langston,* the Devisee of the said *Philip Swain,* and afterwards the said Plaintiff *Underwood* paid the Debts of the said *Philip* and all the Legacies, except two five pounds to two of the Legatees, and for Non-payment whereof the Defendant *John Swain* entred on the Premises as Heir at Law, the Condition being broken. But before the said Entry the Plaintiff *Underwood* sold the Premises to *Toby Payn,* and the said *Toby Payn* devised the Premises to the now Plaintiffs *Thomas* and *John Payn,* and died, pending this Suit, which the now Plaintiff revived.

This Case was reduced to this short Question, *viz.* Whether a Court of Equity can control the Law, or give Relief against an Entry made by the Heir for the Breach of a Condition.

and had been prevented by an extraordinary flood [citing Atkinson *v.* Harmon, *supra*]. Many instances of relief against penalties in money bonds, on the ground that payment had been prevented by some unforeseen event, appear in the time of Elizabeth." To this he has the following note: "As where a person was prevented from doing the act by a flood, Reg. Lib. 13. 1579, fo. 138; by the Plague B. 1582, fo. 269, and the like. In one case the plaintiff, the defendant's tenant, had paid his rent to the plaintiff's servant, who had no authority to receive it, so that he had to pay it over again; being a poor man he had difficulty in again procuring the money, and the landlord refused to receive it when tendered, saying the sun had gone down (which was doubtful, it being a cloudy day) and he brought an action of ejectment on the ground of forfeiture, 'which kind of dealing,' says the order, 'this court doth utterly condemn;' therefore an injunction was granted, B. 1575, fo. 42. Similar order, B. 1575, fo. 258.—Jurisdiction of Court of Chancery, 629, and *n.* (*e*).

"If a man be bound in a penalty to pay money at a day, and place, by obligation, and intending to pay the same, is robbed by the way; or hath intreated by word some other respite at the hands of the obligee, or cometh short of the place by any misfortune; and so failing of the payment, doth nevertheless provide and tender the money in short time thereafter; in these and many such like cases, the Chancery will compel the obligee to take his principal, with some reasonable consideration of his damages (*quantum expediat*), for if this was not, men would do that by covenant which they do now by bond.

"The like favor is extendable against them that will take advantage upon any strict condition, for undoing the estate of another in lands, upon a small or trifling default."—Cary 1.

For cases illustrating the jurisdiction exercised by a court of equity in cases of lost bonds, see the cases of Atkinson *v.* Leonard, *supra,* p. 138, and cases following.

This Court upon View of Precedents in Cases of like nature was clear of Opinion to give Relief to the Plaintiffs notwithstanding the said Forfeiture, and decreed the Plaintiffs and their Heirs to enjoy the Premises against the Defendants and their Heirs.

THE KING *v.* ARUNDEL.

IN CHANCERY, BEFORE LORD CHANCELLOR ELLESMERE, 1617.

[*Hobart* 109.][1]

In Chancery there was a Suit commenced by me, as Attorney General, in the Behalf of the King's Majesty, and the Lord *Hunsdon* as the King's farmer for the Manor of *West Harsley* and *Asalby* in the County of *York*, against the Countess Dowager of *Arundel*, and the Lord *William Howard* and his Lady; which Cause coming to Hearing after I was Chief Justice of the Common Pleas, my Lord Chancellor called to his Assistance in the hearing of it, the Lord Chief Justice *Coke* and myself.[2] This Cause hung long, and had many hearings and Briefs delivered, and after long Consideration was this Term, with uniform Consent of the Lord Chancellor, us the Judges, and Master of the Rolls, decreed for the King: Wherefore the decree is, with the Reasons thereof, advisedly and exactly penned and entred, as of this Trinity Term 14 Jac.

Of this decree therefore at large I will say nothing but this, that the Reason of the Suit in Chancery was not for Want of good Title at Law (for it laid and affirmed the King's Title to be merely by Law, by the Attainder of *Francis Dacres*, whose Land the Bill laid the Land to be, of an Estate in Tail) but the Cause of Suit was made, that the Deeds whereby the Estate was to come to *Francis Dacres* were not Extant, but very vehemently suspicious to have been suppressed and with-holden by some under whom the Defendants claimed, and therefore in the End the Decree ran, that the King and his Heirs, and his said Farmer, should hold and enjoy the Land 'till the Defendants should produce the Deeds, and the Court thereupon take further Consideration and Order.[3]

[1] The case is cited and facts given in Cowper *v.* Cowper (1784) 2 Peere Wms. 720, 748, by Sir Joseph Jekyll, M. R. See also 2 Eq. Cas. Abr. 287.

[2] It appears from Sir Joseph Jekyll's account that the Master of the Rolls, Sir Julius Cæsar, also assisted at the determination of this important case.

[3] "Again it has been said that fraud, accident, and trust are the proper and peculiar objects of a court of equity. . . . Many accidents are also supplied in a court of law; as, loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies."—3 *Blackstone's Commentaries*, 431.

DALSTON *v.* COATSWORTH.

IN CHANCERY, BEFORE SIR JOSEPH JEKYLL, M. R., 1721.

[1 *Peere Williams* 731.]

The plaintiff brought a bill for relief against the suppression of a deed, by which the plaintiff's uncle had settled a term in such a manner as that after his and his wife's death (which wife was the defendant) without issue, the same was to come to the plaintiff for the residue of the term.

The plaintiff's uncle was dead without issue, and the defendant the wife had burnt the deed.

The defendant by her answer but faintly denied it, (*viz.*) *that she did not remember* she ever burnt or destroyed the said deed.

The witnesses swore the limitations of the settlement to be in trust for the husband for life, remainder to the defendant his wife for life, remainder to the heirs of their bodies [by one witness,] remainder to the issue of their bodies [by another,] and for want of issue by the defendant and her husband, remainder to the plaintiff.

Objected for the defendant, that the limitations of the trust of the term being to the heirs of the bodies of the defendant and her husband, or to the issue of the bodies of the defendant and her husband, remainder over to the plaintiff, such a remainder over of the trust of the term was void in law; and therefore supposing the deed to have been suppressed, yet it could not, were it to be admitted, profit the plaintiff, or make him any title.

But by the master of the rolls, it is true, where a term is limited to a man and wife for their lives, remainder to the heirs of their bodies, and for want of such issue, remainder over, this remainder over being but of a term is void: but on the other side, a term may be limited in the following manner, (*viz.*) to trustees in trust for the husband and wife for their lives, and afterwards for their children, or for their issue; and for want of such children or issue living at the death of the said husband and wife, then to go over to the plaintiff, and such limitation (*vide* Stanley *v.* Leigh, *post,* 2 vol. 686) is good; now, since a term might be limited in such a manner, I will intend it to have been so limited in the present case, for every thing shall be presumed *in odium spoliatoris.*

Then his honour considered in what manner the decree should be pronounced, and he cited the case in Hob. 109. The king and lord Hunsdon *versus* countess dowager of Arundel, where the king and his farmer under him claimed title by the attainder of Francis Dacres who was attainted of high treason, and was supposed to be tenant in tail by virtue of a deed not extant, but vehemently suspected to be suppressed and withholden by some under whom the defendants claimed, and therefore it was decreed by the then lord chancellor, with the assistance of

the two chief justices (*Coke* and *Hobart*) that the king and his farmer under him should hold the land until the defendants produced the deed, and the court made farther order thereon; his honour said, that Sir *John Trevor* his predecessor had ordered this decree to be searched for, the term being mentioned in the report, but it could not then be found; however, that he himself having since ordered farther search to be made, had found the same, under the name of Hobart, attorney general *versus* L———[1] so that now any person might have access to the said decree.

That the next case of this nature was, that of Sanson *versus* Rumsey town-clerk of Bristol where the defendant Rumsey had articled to give a portion to Sanson with his daughter, and the defendant had the deed in his custody; the plaintiff suing for the portion, and setting forth the purport of the articles by his bill, the defendant pretended in his answer, that the articles did vary from what the bill set forth, and afterwards burnt the articles; all which being made to appear, he was committed, and continued under confinement till he had admitted the articles to be as the bill had set them forth, which commitment was only by an interlocutory order, and the cause never heard.

The next was that of Hampden *versus* Hampden, heard the 8th of December 1708, where the plaintiff claiming as devisee under the defendant's father's will; by proof it appeared that there was such a will, though no exact account was given of the contents thereof; but inasmuch as the court was satisfied the defendant had suppressed the will, and for that (though no exact proof was made of the contents) the defendant might clear this by producing the will, therefore it was decreed that the plaintiff the devisee should hold and enjoy until the defendant produced the will and farther order. This cause was first decreed by the late master of the rolls, then affirmed by the lord chancellor on appeal, and afterwards by the house of lords. 1 Bro. P. C. 250.

The last case was that of Woodruff and Burton, February 1719, and was thus:

A devisee brought his bill against the heir, and it being made to appear that there was such a bill, as the plaintiff had suggested, and that the defendant had destroyed it, the lord chancellor *Parker* decreed the defendant to convey the premises to the plaintiff in fee, and to deliver up the possession, which (his honour said) seemed to him to be the most effectual and reasonable decree.

But in the principal case the court said, there could be no decree for the possession, nor any present conveyance to the plaintiff, it being only a remainder of a term after the defendant's death; but let the defendant assign over the term to trustees, in trust for herself for life, and afterwards for the plaintiff; and let her bring the deeds relating to the title into court, and pay costs. Reg. Lib. A. 1722. fol. 232. Entered of Easter term 1723.

[1] See also this case particularly stated in the case of Cowper *v.* Lord Cowper, vol. 2, 720.

WHITFIELD *v.* FAUSSET (1749-50) 1 Ves. Sr. 387, 392.—Lord Chancellor HARDWICKE.—The loss of a deed is not always a ground to come into a court of equity for relief: for if there was no more in the case, although he is intitled to have a discovery of that, whether lost or not, courts of law admit evidence of the loss of a deed, proving the existence of it and the contents, just as a court of equity does. There are two grounds to come into equity for relief, annexing an affidavit to his bill. First where the deed is destroyed or concealed by the defendant; and whenever that is the case, the plaintiff is intitled in this court to have relief upon the reason in Lord *Hunsdon's* case in *Hob.* Another is where the plaintiff cannot recover at law without making *profert* of the deed in pleading at law. If a man has lost a bond, he is intitled to come into equity not only for a discovery, but to have a decree for payment; because he cannot declare without making *profert,* the defendant being intitled to *oyer.*[1]

LANCY *v.* RANDLETT.

IN THE SUPREME JUDICIAL COURT OF MAINE, 1888.

[80 *Maine* 169.]

HASKELL, J. The orators ask to be confirmed in their title to land clouded by the loss of their title deed prior to its record.

The respondents demur upon three grounds.

I. For the want of jurisdiction in equity over the subject matter of the bill.

II. For the want of equity shown on the face of the bill.

III. Because of a plain and adequate remedy at law.

Equity jurisdiction for discovery and relief in proper cases touching lost written instruments is as old as equity itself. Sto. Eq. Jur. §§ 79, 84; Whitfield *v.* Fausset, 1 Ves. 392; Blight's Heirs *v.* Banks, 6 T. B. Monroe, 192; Pom. Eq. Jur. § 1376, note 3; Campbell *v.* Sheldon, 13 Pick. 8.

The bill avers more than a dozen years' undisturbed possession under the lost deed, and that the grantor has repeatedly refused to execute a new deed in its stead, and puts searching interrogatories for answer upon oath concerning the execution and delivery and loss of the missing deed; but it does not aver that the loss was not without even the culpable negligence of the orators themselves; nor does it suggest that the

[1] "Many [accidents] cannot be relieved even in a court of equity; as, if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement."—3 Blackstone's Commentaries, 431.

respondents were in any way responsible or chargeable for its loss or destruction.

Equity withholds relief in causes when the party asking it deliberately makes the mischief from which he suffers.

If the loss of a deed be accidental and without the fault of the grantee, thereby subjecting his title to hazard and peril, from which the law gives him no adequate relief, equity will afford that relief most suited to the necessities of the case. Hord *v.* Baugh, 7 Humph. 576; Dalston *v.* Coalsworth, 1 P. Wms. 731, 733.

If the bill be for discovery, containing the averments essential to a bill of that sort, and the discovery is had showing facts that warrant relief in equity or at law, the court having obtained jurisdiction of the cause may award such relief as proper for courts of equity to grant, if relief as well as discovery be prayed for in the bill. Sto. Eq. Jur. §§ 71, 72; Russell *v.* Clarke's Ex'rs, 7 Cranch, 69. If the discovery shows the proper relief to be an award of damages that ought to be ascertained by a jury, an issue can be framed and tried in the same suit without sending the parties to an action at law. R. S., c. 77, § 30.

But to obtain jurisdiction for relief in equity, over a cause purely legal, upon the ground of discovery, the bill must aver that the facts sought to be discovered are material to the cause of action, and that the orator has no means of proving them in a court of law, and that the discovery of them by respondent is indispensable as proof. Pom. Eq. Jur. § 229; Stor. Eq. Jur. § 74, and cases cited; and the want of such averment is fatal on demurrer to the bill when jurisdiction is sought in equity for discovery and relief solely upon the ground of discovery. So, if by plea in such case these facts be traversed, it would seem that the issue must be decided in favor of the truth of the bill, before discovery could be decreed.

If the discovery, as in most cases, be in aid of the averments of the bill that show the cause to be one of equitable jurisdiction, then the averments of necessity for discovery are not essential, and a demurrer cannot be sustained for the want of them, but discovery must follow as a matter of course.

The orators' bill is insufficient for the want of equity, inasmuch as it fails to show the circumstances of the loss of the missing deed, or at least that the loss was occasioned without the orators' fault. For aught that appears in the bill, the orators may have designedly destroyed the missing deed for some fraudulent purpose. For this reason, the demurrer is well taken and the exceptions must be overruled. Hoddy *v.* Hoard, 12 Ind. 474. Nor can the bill be maintained for discovery and relief upon the ground of discovery alone, for the necessary averments in such bill are wanting; but, if the orators can truthfully amend their bill so as to come within the reasoning of this opinion, they should be allowed to do so upon such terms as the court below shall consider just.

If the deed has been lost without fault for which the orators are in

equity chargeable, it would seem that they have no plain and adequate remedy at law. It is true that, although the deed has not been recorded, its contents may be proved by parol in an action at law; Moses *v.* Morse, 74 Maine, 472; but the cloud is upon the record title, and the remedies pointed out by the learned counsellor for respondents fail to heal the apparent defect of title shown by the registry of deeds. That cloud can only be removed by an appropriate decree in a court of equity.

Exceptions overruled.[1]

PIERSON *v.* HUTCHINSON.

CASES AT NISI PRIUS, 1809.

[2 *Campbell* 211.][2]

This was an action by the endorsee against the acceptor of a bill of exchange.

The *Attorney-General* in opening the plaintiff's case stated that he should not be able to produce the bill, as it had been lost; but he should prove that before the action was brought, the defendant had been regularly called upon for payment, and had been offered an unexceptionable indemnity. According to the usage of merchants, he was thereupon bound to honour his acceptance in the same manner as if the bill had still remained in the plaintiff's hands, and had been actually presented to him in the usual form.

Lord ELLENBOROUGH. If the bill were proved to be destroyed, I should feel no difficulty in receiving evidence of its contents, and directing the jury to find for the plaintiff. Even on a trial for forgery, the destruction of the instrument charged by the indictment to be forged, is no bar to the proceedings. I remember a case before Mr. Justice BULLER, where

[1] "A bill will undoubtedly lie, in many cases for the delivery up of title deeds, and it is a very ancient and important head of equity. Lord REDESDALE refers to a case of that description so early as in the time of Edward IV. (Tr. Plead. 95, last Edit.). Where a party is in the Possession of Property to which the Deeds relate, such a Bill may, in some circumstances, be very proper; but where, as Lord REDESDALE observes, 'the Title to the possession of Deeds and Writings, of which the Plaintiff prays Possession, depends on the validity of his Title to the property to which they relate, and he is not in Possession of that property, and the evidences of his Title to it is in his own power, or does not depend on the production of the Deeds or Writings of which he prays delivery, he must establish his Title to the property at Law before he can come into a Court of Equity for delivery of the Deeds or Writings.'" Per Sir THOMAS PLUMER, V.C., in Armitage *v.* Wadsworth, 1815, 1 Madd. 189, 192.

[2] S. C. 6. Esp. 126.

the prisoner had destroyed a bank note he was accused of having forged, by swallowing it. He was acquitted on the merits: but the learned judge who presided held, that he might have been convicted without the production of the bank note, and this doctrine was approved of by the whole profession. Here, however, the instrument is not destroyed. It is lost after being endorsed by the payee. It may now be in the hands of a *bona fide* endorsee for value, who might maintain an action upon it against the defendant. This brings it to the indemnity. But whether an indemnity be sufficient or insufficient, is a question of which a court of law cannot judge. There are *dicta* to be sure, that upon the offer of an indemnity the endorsee of a lost bill may recover at law; but these are so contrary to the principles on which our judicial system rests, that I cannot venture to proceed upon them. Since the plaintiff can neither produce the bill nor prove that it is destroyed, he must resort to a court of equity for relief.

HANSARD *v.* ROBINSON (1827) 7 B. & C. 90, 93.—Lord TENTERDEN, C. J., now delivered the judgment of the court. This was an action on a bill of exchange brought by the indorsee against the acceptor. The bill was not produced at the trial, but proof was given of the signature of the parties, and other particulars of the bill, and that it was lost after it had become due, and after payment had been required of the defendant, and he had requested time and promised payment.

It is not necessary to say whether any special action could have been framed and maintained upon the particular facts and the defendant's promise, because the declaration in the present cause is not founded upon such facts, but upon the bill itself, in the usual way. We would not, however, be understood to give any encouragement to such an action; and we think the special facts cannot properly be considered as affording a satisfactory ground for decision in this case, but the case must be considered generally, as an action brought upon a lost bill, and introducing the general question, whether such an action can be maintained.

Upon this question the opinions of judges, as they are to be found in the cases quoted at the Bar, have not been uniform, and cannot be reconciled to each other. It is not necessary to advert again to the cases. Amid conflicting opinions the proper course is, to revert to the principle of these actions on bills of exchange, and to pronounce such a decision as may best conform thereto. Now the principle upon which all such actions are founded is the custom of merchants. The general rule of the *English* law does not allow a suit by the assignee of a chose in action. The custom of merchants, considered as part of the law, furnishes, in this case, an exception to the general rule. What, then, is the custom in this respect? It is, that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill. The ac-

ceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge pro tanto in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer or retain his money? And if this be the right of an acceptor, ready to pay at the maturity of the bill, must not his right remain the same if, though not ready at that time, he is ready afterwards; and can his right be varied if the payment is to be made under a compulsory process of law? The foundation of his right, his own security, his voucher, and his discharge toward the drawer, remain unchanged. As far as regards his voucher and discharge toward the drawer, it will be the same thing whether the instrument has been destroyed or mislaid. With respect to his own security against a demand by another holder there may be a difference. But how is he to be assured of the fact, either of the loss or destruction of the bill? Is he to rely upon the assertion of the holder, or to defend an action at the peril of costs? And if the bill should afterwards appear and a suit be brought against him by another holder, a fact not absolutely improbable in the case of a lost bill, is he to seek for the witnesses to prove the loss, and to prove that the new plaintiff must have obtained it after it became due? Has the holder a right, by his own negligence or misfortune, to cast this burden upon the acceptor, even as a punishment for not discharging the bill on the day it became due? We think the custom of merchants does not authorise us to say that this is the law. Is the holder, then, without remedy? Not wholly so. He may tender sufficient indemnity to the acceptor, and if it be refused, he may enforce payment thereupon in a court of equity. And this is agreeable to the mercantile law of other countries. In the modern *Code de Commerce* of *France, Liv.* 1. *Tit.* 9. *Art.* 151, 152., this is distinctly provided. And this provision is not new in the law of that country, but is found also in the *Ordonnance de Commerce* of *Lewis* the Fourteenth, *Tit.* 5. *Art.* 19. The rule for entering a verdict for the plaintiff must therefore be discharged.

Rule discharged.

Ex parte GREENWAY.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1802.

[6 *Vesey Junior* 812.]

The object of this petition was to be admitted to prove under a Commission of Bankruptcy in respect of a bill of exchange, alleged to be lost after indorsement. The affidavits stated, that the bill was returned from *America* protested; and the ship was captured in her return; and taken into the Isle of *Rhe* in *Brittany*.

Lord CHANCELLOR. To enable you to prove in respect of this bill, there must be a most extensive indemnity, even for the sake of the bankrupt, who is interested in this; a complete indemnity, going to all the consequences against the holder, if the bill has not been paid, and against any demand, that may be made by future possible holders, if it should have been paid. When I was Chief Justice, I tried an action in the Common Pleas upon a bill, alleged to be lost: which had been previously indorsed by the payee. An indemnity was offered by bond: but I nonsuited the Plaintiff. The counsel objected strongly upon the offer of indemnity; and it came before the Court upon a motion for a new trial; and there was a long discussion upon the nature of these indemnities in a Court of Law. The Court had not come to a decision upon it, when I left them; and I do not know the result. But I never could understand, by what authority Courts of Law compelled parties to take the indemnity.

Upon the new doctrine of dispensation with the *profert* of a bond that difficulty does not arise; for there is the finding of the Jury upon the evidence, that the instrument is lost; which is conclusive between those parties. That has been settled at law, certainly in opposition to the opinions of some of the greatest lawyers. Since I have sat here, I have found in Lord *Hardwicke's* own hand (and he was one of the greatest lawyers who ever sat in *Westminster Hall*) his most positive declarations, that upon such an instrument it is impossible to maintain an action without *Profert* (1 *Ves.* 345, 393). The law is however now settled otherwise. I do not presume to dispute it; for it may be settled upon grounds of pleading: it may proceed upon a supposed analogy to the proceedings in Courts of Equity; and it may proceed upon both. With regard to the supposed analogy to proceedings in Equity, it is questionable, whether sufficient attention was paid to the consideration, that in equity the conscience is ransacked; and the party alleging, that the instrument is lost, must make an affidavit, that it is not in his possession or power. The consequence is, that if a man having an annuity deed differing from the memorial is dishonest enough to put it in the fire, and then to say, it is lost, he is to prove the contents. The best mode of doing that seems to be by producing the memorial; and yet that memorial, if the deed was produced, would have destroyed the deed.

The order was, that the petitioner should be admitted to prove upon giving an indemnity; the Commissioners to settle a proper indemity. (Walmsley *v.* Child, 1 *Ves.* 341.)

JACKSON *v.* HAMMOND.

IN THE SUPREME COURT OF NEW YORK, 1804.

[1 *Caines* 496.]

In this cause, on an affidavit stating a verdict having been in 1792, taken for the plaintiff, subject to the opinion of the court, on a case agreed on between the parties, on which judgment had been given, in 1798 for the plaintiff; and also, that the *nisi prius* record and issue roll were not to be found in the office of the clerk of this court, nor the *nisi prius* record among the papers of the former clerk of the circuit in which the cause was tried, and if left with the plaintiff's attorney, had been burnt or lost.

Leave was given to make up and file a new *nisi prius* record, with a postea to be endorsed thereon, conformable to the minutes of the trial, and also to enter up judgment and issue execution for the plaintiff, according to the opinion of the court in 1798.

No opposition.

WHITE *v.* LOVEJOY.

IN THE SUPREME COURT OF NEW YORK, 1808.

[3 *Johnson* 448.]

A *fieri facias* was issued in this cause, and levied on the goods of the defendant, and afterwards, before a sale of the goods, it was burnt with other papers by an accidental fire, which consumed the house of the deputy-sheriff.

N. Williams, for the plaintiff, now moved that a new *fieri facias*, similar to the one destroyed, might be made out and delivered to the sheriff.

Per curiam. Take your rule for a new *fieri facias* to be made out, *nunc pro tunc*. . . .

KEEN *v.* JORDAN (1869-70-71) 13 Fla. 327, 333. RANDALL, C. J., delivered the opinion of the court. . . . II. The second ground of demurrer is, that the plaintiff is not entitled to relief upon the case stated in the bill, and the question presented is: Has a court of chancery jurisdiction to supply to another court a record of the latter in place of one which has been destroyed by accident? The jurisdiction of the court of chancery, arising from accident, is a very old head of equity, and perhaps coeval with its existence. But every case of accident will not justify the interposition of a court of equity. The jurisdiction will

be maintained only—first, when a court of law cannot give suitable relief, and secondly, when the party has a conscientious title to relief. Both grounds must concur in the given case, for otherwise a court of equity not only may but is bound to withhold its aid. 1 Story's Eq. Jur., 79.

Is there then not merely some remedy, but is there adequate remedy at law? The Legislature, in cases like this, has provided a method of supplying records which have been destroyed or lost; but in such cases, if the court of chancery ever had jurisdiction, the legislative provision of a remedy will not take away the jurisdiction of equity, unless by express prohibition (Case *v.* Fishlack, 10 B. Mon. 40), for otherwise, a court of law might oust a jurisdiction rightfully attached in equity.

The jurisdiction of the court of chancery in the case of lost instruments, as bonds, deeds, &c., was founded upon the doctrine that there could be no remedy, because there could be no *profert* of the instrument, without which a declaration would be fatally defective. And there was another ground for the interference of a court of equity, and that is, that no other court could furnish the same remedy with the fit limitations which might be demanded for the purposes of justice, by granting relief only upon the party's giving a bond of indemnity; a court of law being incompetent to require such a bond as a part of its judgment. 1 Story's Eq. Jur. 82. On the latter ground also, courts of equity had jurisdiction of remedies upon negotiable instruments which were lost or destroyed, for a court of law required that the plaintiff suing upon negotiable paper should produce it at the trial, which he could not do if it were lost. Williard's Eq. Jur. 52; Story's Eq. Jur. § 85.

In coming into equity upon a lost bond or covenant on negotiable instruments, the party must have some object beyond the mere decree of the existence and loss of the paper; he must be entitled to some relief or protection from the court beyond the establishment of the instrument. In the case of a lost bond or note, he may have a decree for its enforcement and satisfaction. If a deed concerning land is lost, and the party prays discovery and to be established in possession under it, equity will relieve, for there is no remedy at law; and where the plaintiff is out of possession, there are cases in which equity will interfere upon lost or suppressed title deeds, and decree possession to the plaintiff; but in all such cases there must be other equities calling for the action of the court. 1 Ves. 434-35; 3 Atk. 132; 1 Fonblanque's Eq. P 1, ch. 1, sec. 3; *id.* ch. 3, sec. 3. These citations sufficiently indicate the grounds of equity jurisdiction in the cases of lost or destroyed papers, without farther illustration.

The power of supplying a new record when the original has been lost or destroyed, is one which pertains to courts of record of general jurisdiction, independent of legislation. It is an inherent power in such courts, and has been acted upon in this State in Rhodes *v.* Mosely, 6 Fla., 12, and in Pearce *v.* Thackeray, decided at Jan'y Term, 1870.

In Douglass *v.* Yallop, 2 Burrow, 722, a new judgment roll, for a judgment rendered thirty years previous to a motion to supply the loss, was ordered to be made. In Jackson *v.* Smith, 1 Caines, 496, a new *nisi prius* record was allowed to be made up on motion and affidavit that the original had been lost or burnt, after six years. In White *v.* Lovejoy, 3 Johns. 448, a *fi. fa.* on which a levy had been made was burnt, and the court ordered a new *fi. fa.* to be substituted. The power has been long and frequently exercised in Alabama. McLendon *v.* Jones, 8 Ala. 298; Doswell *v.* Stewart, 11 Ala. 629; Dozier *v.* Joyce, 8 Porter, 303; Williams *v.* Powell, 9 Porter, 493; Wilkinson *v.* Brandam, 5 Ala. 608; Lyon *v.* Bolling, 14 Ala. 753; Bishop *v.* Hampton, 19 Ala. 792; 3 Ph. on Ev., 1066.

Upon the destruction of any part of a record or of the process, pleadings, or orders in a suit, the loss may be supplied by making up others in their stead, provided the court be reasonably satisfied that the proposed substitute is of the same tenor. Upon that, the court where the suit is must exercise its own judgment. Harris et al. *v.* McRae's adm'r. 4 Iredell, 81.

The proceedings, in all the cases cited, were had in the absence of any statutory regulation, upon the acknowledged and necessary power of the court to control, amend, and supply its own records.

The jurisdiction invoked by the complainant in the present case has not been exercised by any court of chancery in this country or in England (so far as we have been able to discover with our limited means of examination), and the principles upon which the court takes jurisdiction in the cases of lost instruments, come far short of embracing this case. The inherent power of the courts to control their own records, and to supply losses therein, it seems is antagonistic to the power of any other court to interfere and make records for them. By this proceeding, one court of special jurisdiction is invoked to take cognizance of and to supply to another court of general jurisdiction a record, in lieu of one which has been destroyed. This power, once admitted, will place the records of the courts of common law at the mercy of the court of chancery, and might lead to an absurd conflict between the law and equity side of the court over the records of the court of common law: one party imploring the conscience of the one to seize the power of the other and control the history of its past action, and perhaps to compel the court of law to adopt and acknowledge as a fact a thing of which it may deny any knowledge, and against which action the other party may justly ask it to revolt and treat as an usurpation, because its own power is ample and adequate.

There is nothing here requiring the exercise of the conscience of the court which may not be attained by a simple proceeding according to the course of the common law, and therefore chancery has no office to perform.

The decree of the court overruling the demurrer must be reversed upon both grounds of demurrer.

SIR JOHN HARRISON *v.* LORD NORTH, *Ex'r of Lady Montague.*

IN CHANCERY, BEFORE LORD CHANCELLOR BRIDGMAN, 1667.

[1 *Cases in Chancery* 83.]

The plaintiff was tenant to the lady Montague of a house in London, at a certain rent: he left the house, and went to Oxon to the late king, and then sent his servant with the key of the house to the lady, and desired her to re-enter and accept the surrender. She said she would advise with the defendant her son-in-law, (who then set in the house of commons, and acted with them;) afterwards she refused to accept of a surrender. The house was made an hospital by the parliament for maimed soldiers. The defendant, as executor to the lady, brought debt at law against the plaintiff for rent incurred while the house was so used, and all the time. To be relieved against which action was the scope of the bill.

Finch p. Quer. It is but reasonable, that if a tenant be put out by such against whom he can have his remedy over, that he notwithstanding be liable to pay his rent to the lessor. But here the plaintiff hath no remedy over; and it was an act of force in the parliament, which is pardoned by the act of oblivion, and so no remedy over, and the king hath pardoned all his arrears of rent. The law of England is *ex vi termini,* stricter in the matter of rents than other nations; for *redditus and reddere* is accepted as *restituere,* and render implies *apprendre.*

Maynard, for the defendant. The plaintiff hath a pitiful case; but not such as this court can relieve; for the law and equity is all one in this case; and if the latter be no good bar at law, it is not good in equity. And he insisted, that if rebels, the king's own subjects, do an act of force, and hold a tenant out, that is no equity to excuse him from payment of his rent; and cited the case of Carter and Cummins about two years since in this court, where the plaintiff being a tenant of a wharf, which by an extraordinary flood was carried all away, brought his bill to be relieved against paying of his rent; but all the relief he had was only against the penalty of the bond, which was broken for nonpayment of the rent; and the defendant ordered only to bring debt for his rent. And he insisted, that a surrender of lands is no cause for apportionment of rent, which is stronger than the principal case. The Lord Chancellor took time to advise; but declared, if he could, he would relieve the plaintiff.[1]

[1] In Paradine *v.* Jane, 1670, Aleyn 26, the plaintiff declared in debt on a lease rendering rent at the four usual feasts, for rent behind for three years. "The defendant pleads that a certain German Prince, by name Prince Rupert, an alien born, had invaded the realm with a hostile army of men; and with the same force did enter upon the defendant's possession, and him

BARNESLEY *v.* POWELL.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1750.

[*Ambler* 102.]

Petition, by the solicitor for Barnesley (who was a lunatic), setting forth, that he had expended great sums of money in prosecuting suits in this Court, and at law, against the defendant Powell, on behalf of the lunatic, and praying that he may be at liberty to enter up a judgment with a stay of execution against the lunatic, for such moneys, that thereby he may have a lien on his real estates.

Lord *Chancellor.* An action cannot be maintained against a lunatic, but it must be against the person that employed the solicitor, who is the committee. If a solicitor prosecutes to a decree, he has a lien on the estate recovered in the hands of the person recovering for his bills; but if the client should die, the solicitor has no such lien on the estate in the hands of the heir at law, unless it should be necessary to have the suit revived, and then the lien will revive too. In the present case the committee has a lien on the lunatic's estate, and I will assist the solicitor as much as I can, therefore declare he stands in the place of the committee, and has a lien on the lunatic's estate. Q. If he had such lien? The counsel for the solicitor doubted of it.

N. B. Nobody appeared for Powell, and the petitioner had in his hands the title-deeds of the estate, which seems to be the best security.

POWELL *v.* POWELL.

IN CHANCERY, 1708.

[*Precedents in Chancery* 278.][1]

In this case was cited a case where a tenant in tail contracted for sale of his lands, and received part of the consideration money; and upon his not making good the sale by fine or common recovery, a bill was

expelled," so that the defendant was out of possession during the time. The Court sustained a demurrer to the plea. "And this difference was taken, that where the law creates a duty on charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. . . . But when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

[1] S. C. case in 1 Eq. Ca. Abr. 265.

brought in equity to compel him thereto, and a decree pronounced accordingly; he notwithstanding stood out all process against him to a contempt, and then died before the sale was perfected; and after his death a bill was brought against his issue in tail to revive the decree against him, but was dismissed; for though the tenant in tail had power by the fine or recovery to have barred his issue, yet since he did not make use of that power, his issue could not be bound by any other act of his.[1]

TOLLET *v.* TOLLET.

IN CHANCERY, BEFORE SIR JOSEPH JEKYLL, M. R., 1728.

[2 *Peere Williams* 489.][2]

The husband by virtue of a settlement made upon him by an ancestor, was tenant for life, with remainder to his first, etc., son in tail male, with a power to the husband to make a jointure on his wife *by deed under his hand and seal.*

The husband having a wife, for whom he had made no provision, and being in the *Isle of Man,* by his last *will under his hand and seal,* devised part of his lands within his power to his wife for her life.

Object. This conveyance being by a *will* is not warranted by the power which directs that it should be by *deed,* and a will is a voluntary conveyance, and therefore not to be aided in a court of equity.

Master of the Rolls: This is a provision for a wife who had none before, and within the same reason as a provision for a child not before provided for; and as a court of equity would, had this been the case of a copyhold devised, have supplied the want of a surrender, so where there is a defective execution of the power, be it either for payment of debts or provision for a wife, or children unprovided for, I shall equally supply any defect of this nature: the difference betwixt a *non-execution* and a defective execution of a power; the latter will always be aided in equity under the circumstances mentioned, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child. But this court will not help the non-execution of a power, since it is

[1] "And the case of Weale and Lower was cited, where tenant in tail had sold at a full value, and received the consideration money, and had covenanted to levy a fine, and was decreed to do it; yet dying (though in prison for contempt for not performing the decree) the issue in tail could not be bound by it." Cited in Fox *v.* Crane, 1693, 2 Vern. 304, 306. This is probably the principal case.

[2] S. C. Mosely 46; 2 Eq. Cas. Abr. 233, pl. 16; 1 Smith's Leading Cases in Equity, Pt. 1, 365, with notes.

against the nature of a power, which is left to the free will and election of the party whether to execute or not, for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do for himself.'

[1] In Williams *v.* Cudd, 1886, 26 S. C. 213, 218, a married woman, having previously conveyed the land for value, her husband joining, had attempted to relinquish to her vendee her inheritance. In her relinquishment the word "inheritance" had been omitted from the formula "all her estate, interest, and inheritance" which was prescribed by statute. The heirs now sue the vendee for a partition, asserting that the instrument was ineffectual to relinquish their inheritance. The court found the law as follows:

"But it is strongly pressed upon us that, this being a case for partition, the extraordinary jurisdiction of equity may be invoked to consider that done which was intended to be done, and to reform the instrument by adding the word "inheritance," so as to conform to the requirements of the law. We regret to say that we know of no authority to do so, either in law or equity. If this were one of those cases in which the court may interpret executory contracts so as to effectuate the intention, there might be much force in some of the views presented in behalf of the appellant. But clearly this is not one of the cases in which the intention of the parties is a controlling consideration. The question is not what was intended to be done, but sharply what was actually done.

"It is true, according to the authorities, that there are cases in which the Court of Equity will aid the defective execution of a power, provided the parties really intended to execute it, and only failed in a matter of form, and provided also that the power was created by a will, family settlement, or other similar instrument. But, as we understand it, the Court of Equity will not undertake to do so in respect to powers created by statute. "The doctrine is confined to powers created by the voluntary act of persons in wills, deeds, and settlements; it does not extend to those created and regulated by statute. The defective execution of statutory powers, in the failure to comply with the prescribed requisites cannot be aided in equity." 2 Pom. Eq. Jur., § 287, and numerous authorities in note. "And, indeed, it may be stated as generally, although not universally true, that the remedial power of Courts of Equity does not extend to the supplying of any circumstance, for the want of which the legislature has declared the instrument void; for otherwise equity would, in effect, defeat the very policy of the legislative enactments." 2 Story Eq. Jur., § 177, and note.

"This is specially true in regard to statutory powers given to married women, who, outside of the enabling act, are entirely without capacity. "As it is incompetent to show by parol that all the requirements of the law were complied with by the officer taking the acknowledgment, it follows that a Court of Equity has no power to act upon such evidence or to correct or amend a defective certificate. The sufficiency of the acknowledgment is to be determined solely by what appears upon the certificate. 2 Scrib. Dower, 344, 345; Stewart Husb. & Wife, §§ 376, 404, and notes; Knowles *v.* McCamly, 10 Paige 342. In this latter case it was held, that 'when the legal estate is in a feme covert, her deed or contract, conveying or agreeing to convey such estate, if not acknowledged by her according to the statute, is void in equity as well as at law,' etc."

And in this case, the legal estate being in trustees, they were decreed to convey an estate to the widow for life in the lands devised to her by her husband's will.

OSGOOD *v.* FRANKLIN, 1816, 2 Johns. Ch. 1, 19.—The Chancellor [KENT]. 1. The first question arising on the merits is, whether Mary Osgood, as sole surviving executor of Walter Franklin, deceased, was authorized to sell the real estate.

The part of the will of Walter Franklin relating to the question is as follows: "*The whole residue of my estate I give* and bequeath as follows: one eighth to Sarah Corsa, &c.; one eighth to Mary Wister, &c.; to my wife, one eighth, &c.; to my daughters, Maria and Sarah, each one eighth; to my brothers, John, Thomas, and Samuel, each one eighth, &c. And *I order that the money or effects be distributed and divided from time to time, as it can be raised from my debts and estate by my executors, hereafter named,* &c.; and they are to keep a sufficiency undivided, to pay off all legacies, and to keep the *estate* as much on interest or *rents* as they can for the general benefit. And *I appoint my wife with my three brothers aforesaid to be executors,* but on this condition, that if they owe me any money at my decease, their appointment, or acting as executors, shall not be a release of their debts, but the same shall be paid; and if they do not act on this condition, they are not to be executors. *I give to my executors that (they) may act, and to the major part of them, their heirs or executors, full power to sell any or all my real estate not already devised,* &c. I give to each of my executors who shall act, 200*l.* in lieu of all other commissions and rewards, &c."

If the case turned upon the dry question, whether by the common law a naked power without interest to executors to sell, would survive, I should deem the authority of Lord *Coke* decisive. He lays down the rule repeatedly in his *Institutes,* (Co. Litt. 112. b. 113. a. 181. b.) as one well established, that the power would not survive; and the same law was declared by *Dodderidge,* J., the contemporary of *Coke,* and author of the *Touchstone.* (Shep. Touch. tit. Testament. pl. 9. p. 429.) These writers were, in their time, and have been in every period since, regarded as oracles of the common law, and they must have been familiar with the old authorities. I do not, therefore, consider the observations of Mr. *Hargrave,* (Co. Litt. 113. a. note.) even after giving them all the weight justly due to his talents and learning, as being sufficient to overturn a rule so strongly established; and especially when it has been shown by *Mr. Powell,* (Treatise on Devises, p. 292-310.) that he is by no means borne out by the cases to which he refers. The statute of 21 Hen. VIII. c. 4. affords no small confirmation of the doctrine in *Coke;* for the preamble declares the opinion that a sale by executors under a power in a will "can in no wise be good or effectual in the law,

unless the same bargain and sale be made by the whole number of the executors named to and for the same."

But while I thus acknowledge the rule of the common law, I am equally satisfied that this cause is not governed by it. In the first place, this case comes within the exception stated by Lord *Coke;* for here was an interest sufficient to feed the power, and keep it alive in the hands of the surviving executors. The executors were vested by the will with an absolute interest in an undivided moiety of the whole residuary estate, on which the power was to operate, and they were also directed to keep the whole of this residuary estate as much as possible on interest, *or rents,* for the general benefit. This authority to lease, and this interest in the subject itself, must be sufficient to exempt the power from the character of a mere naked authority to a stranger. It is not necessary that the interest coupled with the power should be a legal interest. An equitable estate is sufficient, and is regarded in this Court as the real interest. So it was held by Lord HARDWICKE in Hearle *v.* Greenbank; (3 Atk. 714.) nor does the character of the power depend upon the quantity of interest. A trustee invested only with the use and profits of the land for the benefit of another, has an interest connected with his power. This was so understood in Bergen *v.* Bennett, (1 Caines's Cases in Error, 16.) and in Eyre *v.* Countess of Shaftsbury, (2 P. Wms. 102.) a testamentary guardian, with authority to lease, was held to possess a power coupled with an interest, and capable of survivorship.

In the next place, here was a trust charged on the executors, in the direction given to them to distribute the proceeds of the residuary estate; and according to the settled doctrine of the Court, the trust does not become extinct by the death of one of the trustees. It will be continued in the survivor, and cannot be permitted, in any event, to fail of execution for want of a trustee. In this case, one of the trusts under the will depended upon a sale. In Garfoot *v.* Garfoot (M. 15 Car. II. 1. Ch. Cas. 35.) lands were devised to the wife for life, and then to be sold by the executors, for younger children's portions, and the wife and executors died, and the younger children exhibited their bill to compel the heir to sell; and on demurrer by the heir, on the ground that the executor had but an authority which died with him, the demurrer was overruled. So, also, in Barnes's case, (Sir Wm. Jones, 352. Cro. Car. 382. S. C.) lands were devised to the wife for life, and then to be sold by the executors for payment of debts and legacies, or as one of the reports of the case says, to be divided among the nephews. One of the executors died, and it was held, on a case sent from chancery for the opinion of the judges at law, that the survivor could sell, though the executors had an authority, and no interest. Whatever, therefore, might have been the character of the power in this case, the strict rule of the common law could never be permitted, in this Court, to defeat the trust connected with the execution of the power. Whether the residuary legatees might not have come in and taken the land itself, instead of the proceeds

which the executors, as trustees, were to distribute, and thereby have arrested the execution of the power to sell, is a point not now before me. No such application was ever made; the power to sell was left by the legatees to its full operation; and they come too late, after the sale, to make their election, or to raise such a question.

Either of these grounds appears to me to be sufficient to support the sale by Mrs. Osgood, as the sole surviving executor. There are other considerations, also, which add great weight to this conclusion.

The intention of the testator is much regarded in the construction of these powers, and they are construed with greater or less latitude in reference to that intent. It was evidently the testator's intention here, that the power should not fail as long as there was an executor to execute it, for the power is given even to the *major part* of the *acting* executors, and it was to descend to the legal representatives, both real and personal, of the executors. In other words, it was made transmissible by descent and by will; and though it is left doubtful as to the portion of the executors from whom that transmission was to proceed, I should take the better opinion to be, that it was to proceed, as in the case of other joint interests or trusts, from the *last survivor,* and that the testator could not have intended such incongruity and confusion as the union of the heirs and executors of a deceased executor with the surviving executors. The testator had also in contemplation the possible case of his wife acting alone; for he imposes a condition upon the other executors, without complying with which they were not to be considered as appointed.

I am satisfied, for these reasons, that it would be repugnant to the intention of the will, to the rules of law, and to the principles of this Court, to defeat a power uniting so much trust, confidence, and interest, by applying to it the strict doctrine of the common law, relative to mere naked authorities.[1]

[1] "Mr. Sugden infers [2 Sugd. on Pow. 173], from the authorities, that although equity will supply the defective execution of a power in proper cases, yet it is an immutable rule, that a non-execution shall never be aided; nor is it a ground for relief that the party was prevented by death from an intended execution. . . .

"But when there is a trust the court will interfere. In Brown *v.* Higgs, 8 Ves. 574, Lord ELDON states the principle of all the cases on this subject to be, that if the power is one which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, *who has given him an interest extensive enough to enable him to discharge it,* he is a trustee for the exercise of his power, and without discretion whether he will exercise it or not; and the court adopts the principle relative to trusts, and will not permit his negligence, accident, or other circumstances, to disappoint the interest of those for whose benefit he is called upon to execute it." Per JOHNSTON, Ch., in Withers *v.* Yeadon, 1845, 1 Rich. Eq. 324.

BREWER *v.* HERBERT.

IN THE COURT OF APPEALS OF MARYLAND, 1869.

[30 *Maryland* 301.]

MILLER, J., delivered the opinion of the Court.[1]

After the execution of the written contract for the sale of the house and lot, and before the day fixed for delivery of possession and payment of the first instalment of purchase money, the house was accidentally destroyed by fire, without fault of either party or of the tenant then in possession of the same. The vendor had a fee simple title to the property, and at the proper time, under the contract, offered to deliver possession of the premises in the condition in which they then were. This the vendee refused to receive because of the destruction of the house by fire, and the main question in the case is, can he on this ground successfully resist this application in equity by the vendor for a specific performance of the contract?

In contracts of this kind between private parties, the vendee is in equity the owner of the estate from the time of the contract of sale, and must sustain the loss if the estate be destroyed between the agreement and the conveyance, and will be entitled to any benefit which may accrue to it in the interim. This doctrine, notwithstanding the *dictum* in Stent *v.* Bailey, 2 P. Wms. 290, to the contrary, was plainly announced and settled by the decision of Lord ELDON, in Paine *v.* Meller, 6 Ves. 349, a case very similar in its circumstances to the present, where it was held that if there was no objection to the title of the vendor, or it had been accepted in fact by the vendee before the houses were burned, no solid objection to the bill for specific performance could be founded on the mere effect of the accident before conveyance: "for if the party," says the Lord Chancellor, "by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being encumbered as his; they may be devised as his; they may be assets; and they would descend to his heir." This decision has always been regarded as fixing the true equitable rule in such cases. It was recognized by Sir Thomas PLUMER, in Harford *v.* Purrier, 1 Madd. Ch. 287, and in Rawlins *v.* Burgis, 2 Ves. & Bea. 387, and by Lord Chancellor MANNERS, in Revell *v.* Hussey, 2 Ball & Beatt. 287. From these and other authorities of equal weight announcing the maxim that equity regards as done that which was agreed to be done, is deduced as the established doctrine in equity, that from the time the owner of an estate enters into a binding agreement for its sale, he holds the same in trust for the purchaser, and the latter becomes a trustee of the purchase money for the vendor, and being

[1] A statement of facts and arguments of attorneys have been omitted.

thus in equity the owner, the vendee must bear any loss which may happen, and is entitled to any benefit which may accrue to the estate in the interim between the agreement and the conveyance. 1 Sug. on Vend. 228, 388 to 391; 2 Powell on Cont. 69; Dart on Vend. & Purchasers, 114 to 118; 2 Story's Eq., sec. 1212. The contract here is not for a *sale* at a future day; it does not use in this respect prospective or contingent terms. Its language is, the vendor "*has this day sold to*" the vendee his house and lot, which clearly imports a binding contract *then* executed and consumated. By such terms the *title* in equity passes from the date of the contract, and if there were nothing else in it there would be no room for argument, for it would be impossible to withdraw the case from the operation of the rule above stated.

But it has been earnestly and strenuously urged by the appellant's counsel, that as the contract contains an agreement by the vendor to deliver possession of the house and lot to the vendee, on the first of April, 1866, the destruction of the house by fire before that period, rendered performance by the vendor of this part of the contract impossible, and he cannot, therefore, either in law or equity ask the vendee to perform his part of it; and this circumstance, it is insisted, distinguishes the case from those cited and prevents it from falling within the principle established by them. Let us test the soundness of this argument. The vendee knew before and at the time of the contract there was a tenant in possession, whose term would not expire until the first of April, and the first instalment of the purchase money is made payable on, and interest on the deferred payments runs from that day. The subject matter of sale is *realty*—a lot of ground with a house upon it, described as a house and lot. The agreement as to delivery is not like the usual covenant by a tenant in a lease, to deliver in as good condition and repair as when the contract was made. There is also no difficulty about delivery, except that the premises were not, as to the buildings upon them, in the same condition as at the date of the contract. The question then resolves itself into this, does the fact of the insertion into a contract like the present for the sale of real estate, of an agreement to deliver possession at a future day, make any difference in the application of the rule? It is true it does not appear in the cases cited there were in the contracts any stipulations as to delivery of possession at a future day, nor is this circumstance alluded to, but they explicitly say it is the passing of the *title* in equity which throws the risk of loss upon the vendee, and entitles him to accruing benefits. To this, as we have seen, a conveyance is not necessary, nor is payment of the purchase money or any part of it; for in Hampson *v.* Edelen, 2 H. & J. 66, this Court has decided that "a contract for land *bona fide* made for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time." See also Siter, James & Co.'s Appeal, 26 Penn. State, Rep. 180. Neither can possession nor delivery of possession be necessary, for if the contract had been silent

on this subject, the vendor would have had the right to retain possession at least until the first of April, when the first instalment of the purchase money was payable, and if the vendee had obtained possession before, he would have been restrained in equity from exercising any acts of ownership prejudicial to the inheritance; (Crockford *v.* Alexander, 15 Ves. 138; Reed *v.* Lukens, 44 Penn. Rep. 202) and yet the equitable title would all the while have been in him, subject to his disposition by deed or will, and liable for his debts. If then in the absence of a stipulaton to deliver at a future day, there is an implied right in the vendor to retain possession until that period, and this would make no difference as to the liability of the vendee for an intermediate loss, how can the insertion of such a stipulation have in equity any different effect? The whole foundation of this doctrine of equity is that the equitable title and interest passes by the *contract* of sale, and from the *time of its execution,* and it contemplates delivery of possession as well as payment of purchase money, and a conveyance at a future period. Hence, Sir Edward SUDGEN and Sir Thomas PLUMER both cite, as in exact accord with the decision of Lord ELDON, the rule of the civil law, where the very case is put in the Institutes: "*Cum autem emptio et venditio contracta sit, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit: Itaque, si ædes totæ vel aliqua ex parte incendio consumptæ fuerint—emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere.*" In sales of personal property, delivery of the goods sold is not necessary to pass title as between the parties, where the statute of frauds has been gratified by giving something in earnest, or payment of the whole or part of the purchase money, or a sufficient note or memorandum in writing of the bargain; and in such case the property is at the buyer's risk before delivery. Franklin & Armfield *v.* Long, 7 G. & J. 418. And even where the seller remaining in actual possession *agrees* to deliver the property at a particular place, and it is destroyed by fire before such delivery, the loss will fall on the purchaser. Terry *v.* Wheeler, 25 N. Y. Rep. 520. Where sales are made under authority of a Court, the contract is not regarded as consummated until it has received the Court's sanction or ratification, and, therefore, any loss happening before confirmation falls upon the vendor. *Ex parte* Minor, 11 Ves. 559; Wagner & Marshall *v.* Cohen, 6 Gill, 102. But where a loss occurs after confirmation, by which the contract is consummated, it falls upon the vendee, even though no purchase money has been paid, and the vendor remains in possession. This was expressly decided in Robertson *v.* Skelton, 12 Beav. 260, where Lord LANGDALE also said: "In equity the estate belongs to the purchaser from the date of the order to confirm the report, and the right of possession belongs to the vendor till the purchase money, for which it is security, has been paid." Again, if we look to the contract itself, and gather therefrom the intent of the parties, it is clear from the language used, their intention was that the equitable title and interest should pass

from the day of its execution. Upon this point its terms are too positive and explicit to admit of doubt. Delivery of possession and payment of purchase money were postponed to a future day for the convenience of each party respectively, and we cannot construe the agreement to deliver, into a *condition* that the contract shall be *void* if there is any change in the state or value of the property on the day of delivery, nor interpolate any such words into the instrument. We are, therefore, constrained to hold the argument founded on this delivery clause, to be unavailing to the appellant.

But it is said specific execution of contracts is in all cases not a matter of absolute right, but of sound discretion in the Court, and as the vendor cannot now deliver the house which was the main inducement to the vendee to buy, and constituted the chief value of the property, it would be inequitable to enforce the contract as against him. If this objection were sound, this doctrine of losses and benefits could never have been established. But whilst it is conceded an application for specific performance is always addressed to the sound discretion of the Court, yet where a contract respecting real estate is in writing, and is in its nature and circumstances unobjectionable, it is as much a matter of course for a Court of equity to decree a specific performance of it, as it is for a Court of law to give damages for a breach of it. Smoot *v.* Rea & Andrews, 19 Md. 405; 2 Story's Eq. sec. 751. "The fairness or hardship of a contract like all its other qualities, must be judged of at the time it was entered into, not by subsequent events." If it was *then* certain, mutual, fair in all its parts, and for an adequate consideration, it is immaterial that by force of subsequent circumstances, it has become less beneficial to one party unless such change is in *some way the fault* of the party seeking its specific execution. Revell *v.* Hussey, 2 Ball. & Beatt. 288; Lawder *v.* Blachford, Beatty's Rep. 526; Webb *v.* Railway Co. 9 Hare, 129; Low *v.* Treadwell, 3 Fairfield, 541; Fry on Specific Performance, 93, 98. Adherence to principle compels the Courts to overlook the hardship of particular cases. But the doctrine upon which this decision rests, is founded in strict justice and equity, for whilst the vendee may think it hard to be compelled to pay for that which he cannot have in the condition it was when he purchased it, the vendor, with equal justice, might think it hard to lose his money after a *bona fide* sale of his property, because of an accident accruing to it without fault on his part. It is to be remembered too that whilst the rule burthens the vendee with a loss, it also entitles him to all benefits. Thus where a reversionary interest is agreed to be purchased and lives drop, or one agrees to purchase an estate in consideration of a life annuity to the vendor, and the *cestui que vie* dies, or where there is a sudden rise in the value of the land from its being required for a public purpose, before conveyance, in all such cases the vendee reaps the benefit. So in the case before us, if a valuable mine had been discovered on the premises the day after the contract, or by any unforeseen or unexpected circumstances their value

had been increased a hundred fold, the benefit would have resulted to the vendee, and the vendor could not have been released from his contract. We cannot therefore, sustain this objection to the bill.

It appears that at the date of the contract the vendor held a policy of insurance upon the house, which by accident he allowed to expire without renewal before the fire, and of this the vendee received from him no notice. A similar state of facts existed in Paine *v.* Meller, and was held to constitute no objection to the vendor's bill. It is admitted there was no understanding between the parties that the vendor should keep the policy alive. They did not contract on any such basis. After the contract the vendee had an insurable interest in the house and in the absence of all agreement on the subject, the presumption is, he intended to protect himself by insuring in his own name, or to take the risk of a failure to insure. The vendor was not bound to keep up the insurance or give notice to the vendee of its having expired. If the policy had existed at the time of the loss, the vendor could have recovered from the insurance company, but being trustee of the premises for the vendee, he would be bound in equity to account to the latter for the money so received (Reed *v.* Lukens, 44 Penn. Rep. 200); but his failure to renew or to give notice cannot deprive him of his right to enforce the contract of sale.

It also appears there was at the date of the contract a judgment against the vendor for $2,363.38, but he had at that time entered an appeal from the judgment to the Court of Appeals, and given an appeal bond with security amply sufficient for that purpose to pay the amount of the judgment with costs, in case he should fail to prosecute his appeal with effect. The authorities are clear that equity will not compel a vendee to take an imperfect or defective *title,* yet cases of high authority are to be found in which a pecuniary charge against which adequate security has been given, has been held not to constitute a defect in *title,* and also where equity has enforced the agreement where a perfect title can be made at the time of the decree. But this judgment thus appealed from, with appeal bond given, does not in the sense in which Courts of equity use the terms, make this such an imperfect, or defective, or encumbered *title,* as will prevent specific execution, and especially not where the decree itself, as that appealed from in fact does, can protect the vendee by providing that the judgment debt may be paid by him out of the purchase money due on the contract and in discharge thereof.

We have bestowed upon the case our best care and consideration. We find nothing in the authorities cited by the appellant's counsel sufficient to overthrow the doctrine upon which we have based our decision, and can discover no ground upon which in justice and equity, the appellee can be denied the relief he seeks. The decree must be affirmed.

Decree affirmed.

SECTION 2. MISTAKE.

PUSEY *v.* SIR EDWARD DESBOUVRIE.

IN CHANCERY, BEFORE LORD CHANCELLOR TALBOT, 1734.

[3 *Peere Williams* 315.] [1]

Sir Edward Desbouvrie was a freeman of London, and possessed of a very great personal estate. He had a wife, with whom he had compounded as to her customary part, and had a son (the defendant) to whom he had given very considerable sums of money in order to enable him to trade. He had also one daughter.

The father made his will, giving (*inter al.*) to his daughter £10,000, upon condition that she should release her orphanage part, together with all her claim or right to his personal estate by virtue of the custom of the city of London, or otherwise, and made his son executor, his daughter being about the age of twenty-three years.

After the father's death it was agreed between the daughter and the brother that she should accept of her legacy of £10,000, and upon the terms whereon it was given her by her father's will, that is, she to release all her right by virtue of the custom, etc., which release was accordingly prepared, and before she executed it, her brother informed her that she had it in her election to have an account of her father's personal estate, and to claim her orphanage part, and her uncle was then present. But the daughter at that time declared she would accept of the legacy left her by her father, that being a sufficient provision for any young woman; and thereupon she executed the release, being then about twenty-four years old, and the brother paid to her the £10,000 and interest. The daughter afterward married one Mr. Pusey, an attorney at law, who brought a bill to set aside this release, charging that the personal estate of which the father died possessed was much above £100,000, the daughter's share of which by the custom would amount to upward of £40,000, that the mother having been compounded with for her customary part, the freeman's personal estate was to be distributed as if there was no wife, consequently the dead man's part was one moiety, and the children's part the other; and that the brother, the defendant, Sir Edward Desbouvrie, had been advanced in his father's lifetime by his father at different times with several great sums of money, the whole whereof would amount to a full advancement of the son; so that the plaintiff Pusey, in right of the daughter his wife, was entitled to a moiety of her father the freeman's personal estate.

The defendant the brother pleaded this release.

Against which, on behalf of this plaintiff, at first it was argued that as the bill was brought to set aside the release, the defendant ought not to be admitted to plead it in bar, the rule being, *non potest adduci ex-*

[1] Same case is more briefly reported in 2 Equity Cases Abridged, 270, pl. 24.

ceptio ejusdem rei cujus petitur dissolutio. But the Lord Chancellor here interrupted the counsel, saying, this was every day's practice; and that otherwise no release or award could be pleaded to a bill that was brought to set aside the same.

Then it was urged that no computation or account had as yet been taken of the father's personal estate, and that it could not be imagined the daughter intended to present her brother with £30,000, or that she knew what her right was; that she was not apprised that, by reason of her mother's being compounded with, the children's share, instead of a third, was a moiety; or that her brother, the defendant, being fully advanced by his father in his lifetime, this was a bar to him of his orphanage part; and though at law it was said *ignorantia juris non excusat,* yet if any one should take advantage of another's mistake in the law, even without any fraudulent suggestion or practice made use of by him, it would be against conscience so to do, and they put this case: Suppose A should devise lands to B and his heirs, and B should die in the life of the testator, and then the testator dies, after which the testator's heir, not knowing that by law the devise to B is void (by B's dying in the life of the testator) should for a trifle release his right to a valuable estate to the heir at law of such devisee; surely such release would not stand good; and as it was out of the father's power by devise or otherwise to debar any of his children of that share which they are entitled to by virtue of the custom; so here it was somewhat hard in the father to induce his daughter by any words in his will to give away and release what she had an undoubted right to; and admitting there was no direct fraud or misrepresentation, here was, however, *suppressio veri.* though not *suggestio falsi;* and in this case, since it would not be pretended that the daughter could have meant to give away £30,000 to her brother, though he had asked for it, therefore this release ought not to be made use of in a court of equity to bar the daughter of that right which she did not know she herself had, and much less intended to give away.

On the other side, it was said to deserve consideration that the father did by his will give this legacy of £10,000 to his daughter, upon condition that she should release all her right by the custom; and though it could not be said here was a positive injunction on the daughter to do so, yet in all probability it was intended as a recommendation by the father, who might think £10,000 a reasonable and honorable provision for the daughter, as she herself declared she thought it was when she gave this release; and the father might be desirous that his son, who was to support his name, should have the rest of his estate; that the daughter might reasonably have a great regard for the intentions of her deceased father (for which she was highly to be commended) and might thereby be induced to comply with such intention, at the same time that she knew in strict justice there was more due to her by virtue of the custom.

That however it was plain the brother had acted in this case without

the least appearance of fraud when he told her, before she executed the release, that she might, if she pleased, call him to account for the whole personal estate of her father, and have her orphanage part thereof; that this being the solemn act and deed of the party, executed by her freely and without any sort of compulsion or misrepresentation, and in compliance with her own father's will; and since, if the daughter was not informed of the custom of London, it was her own fault and not her brother's; for these reasons it was said the deed of release ought not to be set aside.

LORD CHANCELLOR. I do not see that any manner of fraud has been made use of in this case, but still it seems hard a young woman should suffer for her ignorance of the law, or of the custom of the City of London; or that the other side should take advantage of such ignorance. I remember well that in this very case where the wife has been compounded with as to her customary part, not only the counsel have differed, but the court themselves have varied in their determinations. It has for instance been held and determined by the court that if the husband, a freeman of London, has compounded with the wife before the marriage as to her customary part, this being the husband's own purchase, he ought to have as well his wife's customary part as his own; but now a different resolution seems to have prevailed, viz., that where the wife is compounded with before marriage, it should be taken as if there was no wife, and consequently the testator shall have one half and the children the other. And if the court themselves have not, till very lately, agreed in what shares or proportions these customary parts shall go, the daughter surely might be well ignorant of her right and ought not to suffer, or give others any advantage, by such her ignorance. Neither can it be inferred with sufficient certainty what the father recommends in this case; he rather seems to leave it to his daughter's option, either to claim her customary part or release her right thereto and accept the legacy.

It is true, it appears, the son, the defendant, did inform the daughter that she was bound, either to waive the legacy given by the father or to release her right by the custom; and so far she might know that it was in her power to accept either the legacy or orphanage part; but I hardly think she knew she was entitled to have an account taken of the personal estate of her father, and first to know what her orphanage part did amount to; and that, when she should be fully apprised of this, then, and not till then, she was to make her election, which very much alters the case; for probably she would not have elected to accept her legacy had she known, or been informed, what her orphanage part amounted unto before she waived it and accepted the legacy.

It would give light into this cause to know what might be the value of the father's personal estate at his death, and (if the parties think fit) what was the value thereof when the will was made; because it has been said to have been increased by the father between the time of making his

will and his death; and also to know what the son has received in his father's lifetime from his father for or toward his advancement.

Therefore let the plea stand for an answer, saving the benefit thereof until the hearing; and let the defendant, the son, answer not as to particulars (for that I do not expect) but by way of computation in gross as to these points.[1]

LAMMONT'S HEIRS AND DEVISEES *v.* BOWLY'S HEIRS.

IN THE COURT OF APPEALS OF MARYLAND, 1825.

[6 *Harris* v. *Johnson's* 500.]

One William Lux by his will, devised to Agnes Lux, his wife, "for and during her natural life, my tract of land called *Chatsworth,* with the dwelling house, and all the buildings and improvements thereon (save and except the rope-walk). And I give to my son George Lux, his heirs, &c., my tract of land called *Chatsworth,* &c., but in case my *said son should die before he attains of legal age, and without issue,* then I bequeath the said land to my son's wife and her assigns to be at her own will and disposal, as it originally was (save and except five acres to be laid off in a long square, &c., and that said five acres, together with the rope-walk and all the buildings, &c., I give to my nephew and partner, Daniel Bowly, his heirs,") &c.

Daniel Bowly, the nephew, believed that he had no title to the five acres, unless George Lux, the testator's son, died *within age and without issue,* and on his having issue, supposed the son to have a clear title to the five acres. Under that impression he was privy to a sale of that part of *Chatsworth* by George Lux, to Daniel Lammont (ancestor of the complainants), for a fair and valuable consideration, and permitted Daniel Lammont to take possession of it and to enjoy it for many years unmolested. Afterwards being advised that the effect of the devise was to give him these five acres, independent of the contingency of George Lux's *coming of age,* or *dying without issue,* he instituted an ejectment for them and recovered. Whereupon the purchaser, Lammont, filed his bill to stay proceedings at law. From the decree of the Baltimore County Court, sitting as a court of equity, dismissing the bill the complainants appealed.[2]

[1] It appears from the Register's book that on the 8th of May, 1735, upon the defendant's motion it was alleged, that the suit was agreed between the parties; it was therefore prayed that the plaintiff's bill might be dismissed without costs; which on consent of the plaintiff's counsel was ordered accordingly.—Reporter's note.

[2] The statement of the case is shortened.

Williams, Taney and Harper for the appellants.

R. Johnson and Wirt (Attorney-General of U. S.) for the respondents.

STEPHEN, J., delivered the opinion of the Court.[1]

The complainants, who are representatives of Lammont, filed a bill on the equity side of *Baltimore* county court, to obtain an *injunction* to stay proceedings at law, and to have a conveyance of all the right and title of Bowly's representatives, to the purchases made by Lammont in his life-time, executed to them. The county court, with the consent of the parties, decreed *pro forma* a dismissal of the complainant's bill, with costs to the defendants; from which decree the defendant's have appealed to this court. The question now to be decided is, whether or not they have shown sufficient grounds of equity to entitle them to the relief, which they come here to obtain? And whether they are so entitled, depends upon the agency which Bowly had in the purchases made by their deceased ancestor, and the knowledge he had of his rights at the time they were made. The principle involved in the decision of this question is an important one, as well on account of its immediate bearing upon this case, as of the influence and operation it may hereafter have in deciding questions of title which may arise under similar circumstances. The question presented for the decision of this court is simply this, whether a man, having a legal title to a parcel of land, but who is ignorant of his right, forfeits his title to that land, by concealing his right, when he knows that another is about to purchase it from a third person? And this question is to be decided upon the principles of equity and conscience, which can never inflict a punishment upon innocence, or decree a forfeiture, when there has been no fault. On the contrary, it is at all times the anxious wish of a court of chancery to relieve against forfeitures and penalties, where the principles of justice and equity do not forbid it. Has then the conduct of Daniel Bowly been such as to merit the infliction of punishment at the hands of this court? Because a punishment it is termed by the authorities which treat upon the subject, and they speak of the forfeiture as a punishment inflicted by reason of the guilt of the party in not disclosing his right. It would, at the first blush, seem quite sufficient to ask, how can a man disclose a title of which he has no knowledge? To the common sense of the world this would seem to be an impossibility, and the law, which is a system of written reason, never enforces a vain or impossible thing. It is proved by all the witnesses who speak upon the subject, that they never heard of Bowly's claiming any title to the property in question, until long after the purchases were made by Lammont, and all of them were his neighbours, and some of them his most intimate friends. Nor is it a matter of surprise that Bowly was unacquainted with the operation of law upon that clause of William Lux's will, under which his representatives now claim title to the property in controversy, since it appears that the judicial tribunals of the state entertained different opinions upon the

[1] Only a part of the opinion is given.

true construction of it, aided as they were by all the lights of science in their exposition of it. It may then be safely assumed to have been at least a doubtful question, and one upon which it is not unreasonable to say, that Bowly might have been in the dark. If then he was ignorant of his title, what says the law upon the subject? In 1 Powell on Contracts, 131, 132, 133, after stating that there might be either an express or tacit assent to a contract or agreement, he says, "a tacit assent may arise in several ways—It may be inferred from inaction, or forbearance of acting. Thus a man, by his silence, in case he be present, and acquainted with what is doing, is supposed to give his assent to what is then done; unless it appears that he was awed into silence, or any way hindered from speaking." "And in such cases, assent is presumed even against an infant; for it is meant as a punishment for his concealing his right, by which an innocent person is drawn in to advance his money." If then a tacit assent is imputed to infants, who are peculiarly the objects of a court of chancery's care and protection, it can only be upon the ground of knowing their rights, and a culpable and fraudulent concealment of such knowledge. The same author says, in page 134, "in order to warrant us in concluding from a man's silence, that he has relinquished his right, two things are necessary—The first is, that he should know that what belongs to him is conveying to another; for when one forbears to act through mere ignorance, it can have no effect"—and "secondly, that he should be voluntarily silent, though he has full liberty to speak." So in 1 Fonblanque, 161—The author says, "there is also an implied as well as an express assent; as where a man, who has a title and knows of it, stands by, and either encourages, or does not forbid the purchase, he shall be bound, and all claiming under him, by it. Neither shall infancy or coverture be any excuse in such case. And this seems a just punishment for his concealing his right, by which an innocent man is drawn in to lay out his money." It is then upon the principle, that the party committed a fraud by concealing his right, that he becomes bound, and all claiming under him. In Niven *vs.* Belknap, 2 Johnson's Rep. 589, the same principle is recognized by THOMPSON, Justice, that where a man has a title, and knows of it, and either encourages, or does not forbid the purchase, he, and all claiming under him, shall be bound by such purchase; and in support of his opinion he refers to 1 Fonblanque, 161. In Levy *vs.* The Bank of the United States, 1 Binney's Rep. 27, the case was this; a forged check was credited as cash in the holder's bank book, and he being afterwards informed that the check had been forged, under a mistake of his legal rights, agreed that if the check was a forgery, he would not take advantage of the deposit. SHIPPEN, chief justice, decided, that the party was not bound by his agreement, it being made under a mistake of his right. In this case the chief justice says, "the case of Penn and Lord Baltimore is decisive to this point. I was present at the agreement half a century ago, and heard Lord HARDWICKE say, though it is not mentioned in the printed report, that if Lord

Baltimore made the agreement in question, under a mistake of his right to another degree of latitude, he ought to be relieved, but that he was not mistaken." In Green *vs.* Price, 1 Munford, 453, Judge TUCKER lays down the law to be, that if a man has an equitable title to lands, and knows of it, and either encourages, or does not forbid the purchase, he, and all claiming under him, shall be bound, by it; and in support of his opinion he refers to 1 Fonblanque, B. 1 ch. 3, s. 4. Thus it appears, that some of the most enlightened and eminent judges of our country, have given their sanction to the doctrine, that a party is not bound by his silence, unless he has a knowledge of his right, and fraudulently conceals it where he ought to speak. In Bize *vs.* Dickason, 1 T. R. 285, Lord MANSFIELD in delivering the opinion of the court, is reported to have said, "the rule had always been, that if a man has actually paid, what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action." Evans, in his essays, treating upon mistakes of law, lays down the law to be, that where no natural obligation intervenes, even what is paid under a mistake in law, may be recovered back; and he refers, in support of his opinion, to certain decisions of Lord KENYON and Lord MANSFIELD, to the same effect, and observes, that he conceives it may now be positively stated, that this opinion is adopted in the English law. In Evans *vs.* Llewellyn, 2 Brown's Chancery Cases, 150, it is decided, that a conveyance obtained from persons uninformed of their rights, should be set aside, though there was no actual fraud or imposition. In Hunt *vs.* Rousmanier, 8 Wheat. 214, the chief justice, in speaking of the case of Lansdowne *vs.* Lansdowne, says, if it be law, it has no inconsiderable bearing on this cause. There are certainly strong objections to this decision in other respects; but as a case in which relief has been granted, or a mistake in law, it cannot be entirely disregarded. He then goes on to say—"Although we do not find the naked principle that relief may be granted on account of ignorance of law, asserted in the books, we find no case, in which it has been decided, that a plain and acknowledged mistake in law, is beyond the reach of equity." We have here, then, the high authority of this most distinguished man, and eminent judge, that a party acting under a clear and unequivocal mistake of his legal rights, is entitled to relief in a court of equitable jurisdiction; and that the doctrine of a court of chancery is not, as has been contended, that equity will not administer relief upon that ground, upon the principle that every man is bound to know the law. It is not intended to say, that the plea of *ignorantia juris* would in all instances be available in civil cases, (in criminal it never can be,) because some legal propositions are so plain and familiar, even to ordinary minds, that it would be doing violence to probability to impute ignorance in such cases; but it is only meant to say, that where the legal principle is confessedly

doubtful, and one about which ignorance may well be supposed to exist, a person acting under a misapprehension of the law in such a case, shall not forfeit any of his legal rights, by reason of such mistake. So Newland, in his treatise on contracts, says, that mistake or misapprehension of the law, is a ground of relief in equity; as if a man purchases his own estate, and pays for it, the court will order the purchase money to be refunded, on the ground that there was a plain mistake. It appears then, from what has been observed in the foregoing opinion, that some of the most enlightened and celebrated men, whose characters are recorded in judicial history, have given the sanction of their illustrious names to the doctrine, that no man, acting under a plain and acknowledged mistake of his legal rights, shall forfeit those rights, in consequence of such misapprehension. The authorities in support of this principle, might be multiplied to an almost indefinite extent, but it is deemed unnecessary further to enlarge upon the subject. It is the opinion of this court, that the decree of the court below be affirmed, with costs to the appellees.[1] Decree affirmed.

GILLESPIE *v.* MOON.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1817.

[2 *Johnson's Chancery* 585.]

THE CHANCELLOR. The bill is brought to rectify a mistake in the conveyance to the defendant, which, by an error in the description of the land, conveyed the whole lot, or 250 acres, instead of 200 acres, parcel of the same. The mistake is positively denied in the answer; and it is objected, that patrol proof of the mistake is inadmissible, in opposition to the plain language of the deed, and especially, in opposition to the defendant's answer.

1. Assuming the parol testimony to be competent, the fact of the mistake, on the part of the grantor, is made out to my entire satisfaction. There are circumstances, independent of the parol proof, that afford pretty strong presumptive evidence of mistake. The deed to Mrs. Mann, in 1799, after mentioning the number and describing the boundaries of the lot, adds, that it *contains* 250 *acres, more or less.* The defendant lived on part of the lot, and other tenants occupied other parts of it, at the

[1] For a valuable case commenting upon and approving the doctrine of the principal case see Cumberland Coal & Iron Co. *v.* Sherman *et al.*, 1863, 20 Md. 117. See also Kearney *v.* Sascer, 1872, 37 Md. 264; Carpenter *v.* Jones, 1876, 44 Md. 625.

time of the purchase by the defendant, and the number of acres was a fact likely to be known by the several persons interested in the lot. It is not pretended in the case, that the lot did not contain 250 acres, and when the defendant applied to purchase, it is extremely probable that he and Mrs. Mann equally well knew so important and so notorious a fact, as the number of actual or reputed acres. But the agreement for the purchase, signed by both of them, on the day of the date of the deed, stated that Mrs. Mann had agreed to convey to the defendant, a *tract of land containing* 200 *acres;* and the deed itself, which follows, in the description of the boundaries, the words of the former deed to Mrs. Mann, adds *containing* 200 *acres, more or less.* Why did it vary, in this particular, from the former deed, and not follow the description throughout? This was a circumstance which would probably attract attention, as soon as the other parts of the description. A purchaser being on the lot, and well acquainted with it, would ordinarily attach much importance to a declaration of the *quantity* of acres. If the whole lot was intended to have been sold, it is inconceivable why that part of the description, in the former deed, should have been varied in so great a degree, as from 250 to 200 acres, and why the previous agreement, in writing, should speak of a *tract of land of* 200 *acres,* instead of *the lot itself,* well known to contain 250 acres.

The two receipts for rents, dated the 8th and 9th of June, 1804, do not appear to me to afford much inference, one way or the other. The first receipt was for the payment of the arrears due from the defendant for his 100 acres, and the second for arrears from the other occupants. It says, in full for rent for lot 57, *occupied by defendant.* This was a loose, and very inaccurate expression, and it is difficult to know what was meant. These receipts appear to me to be of no moment in the case.

But if we resort to the parol proof, it is clear and overwhelming, when connected with the inference from the documents, that Mrs. Mann did not intend to sell, and that the defendant did not intend to buy, more than 200 acres, and that the 50 acres occupied by Cable were not included in the bargain.

Elizabeth Crossby was present when the parties were making the contract, and she remembers that Mrs. Mann was positive and absolute in her refusal to sell more than 200 acres, or to sell the part occupied by Cable, and that she assigned as a reason, that Cable held the land under lease. We have also the testimony of several witnesses residing near the land, and who had been long and well acquainted with the lot and with the defendant, who testify to the great value of Cable's part in 1804, and to the confession of the defendant, after his return from making the purchase at New York, that *he purchased* 200 *acres only, and did not purchase Cable's part of* 50 *acres, but that he found, afterwards, that his deed included the whole lot.* The witnesses, who testify to these confessions and declarations of the defendant, are Josiah Corbet, Jonathan Wood, David Brown, Caleb Brown, Daniel Case, and Jonathan

Cable. These six witnesses are all unimpeached; most of them are neighbors to the defendant, and strangers to the plaintiffs, and it is impossible not to give full credit to such a mass of testimony all going to one point. In addition to this, we have the testimony of David Austin, who was in New York, with the defendant, in June, 1804, and he understood from him, at the time, that his business was to purchase 200 acres of the lot. It is also proved by Cable, that the defendant told him, a short time before the purchase, that he was going to purchase 200 acres of the lot.

Some of these witnesses falsify the answer in other parts, and prove it untrue as to a matter of fact within the defendant's own knowledge. The answer says, that immediately on receiving the deed, the possession of the whole lot was delivered to him by the tenants, all of whom either surrendered their possession to him, or took deeds under him, and that he offered deeds to all the tenants, and particularly to Jonathan Cable, who refused a deed, and voluntarily surrendered his possession to the defendant. Cable not only contradicts the fact of any such offer to, or surrender by him, but it is proved, by Charles and John Blowers, that the defendant entered forcibly, and took possession of the mill belonging to Cable.

2. It is unnecessary to enter more minutely into the parol proof of the act of the mistake. On that point there is no room for doubt. The only doubt with me is, whether the defendant was not conscious of the error in the deed, at the time he received it and executed the mortgage, and whether the deed was not accepted by him in fraud, or with a voluntary *suppression of the truth.* That fraudulent views very early rose in his mind, is abundantly proved. He asked Corbet (a witness) if he could not so run the line as to save the lower mill-seat to himself; and he told David Brown that he meant to take counsel, and if he found he could hold the whole lot, he intended to do so, as it was not his fault that the deed was made as it was.

It would be a great defect in what Lord Eldon terms the moral jurisdiction of the Court, if there was no relief for such a case. Suppose Mrs. Mann had applied for relief, instantly, on discovery of the mistake, and immediately after the delivery of the deed; was there no power in the whole administration of justice competent to help her? It has been the constant language of the Courts of equity, that parties can have relief in a contract founded in mistake, as well as in fraud. The rule in the Courts of law is, that the written instrument does, in contemplation of law, contain the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties, than any that can be supplied by parol. But equity has a broader jurisdiction, and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself. "It must be an essential ingredient," says Lord THURLOW (1 Bro. 350) "to any relief under this head, that it should be on an accident per-

fectly distinct from the sense of the instrument." I have looked into most, if not all, of the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, that relief can be had against any deed or contract, in writing, founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively, by bill, or as a defence.

In Henkle *v.* The Royal Exchange Assurance Company, 1 Vesey, 317, Lord Chancellor HARDWICKE said, the Court had jurisdiction to relieve, in respect of a plain mistake in contracts in writing, as well as against frauds in contracts. The same doctrine appears to have been held by him in Simpson *v.* Vaughan, and in Langley *v.* Brown, 2 Atk. 31, 203, and by Lord THURLOW in Taylor *v.* Radd, cited in 3 Bro. 454; 5 Vesey, 595. So, again, in Baker *v.* Paine, 1 Vesey, 456, Lord HARDWICKE observed, "How can a mistake in an agreement be proved but by parol evidence? It is not read to contradict the face of the instrument, but to prove a mistake therein." In Irnham *v.* Child, 1 Bro. 94, Lord THURLOW said, that a mistake creating an equity *dehors* the deed, should be proved as much to the satisfaction of the Court, as if it were admitted; and, afterwards, in Shelburne *v.* Inchiquin, 1 Bro. 341, 344, he held that parol proof was not incompetent to prove that words taken down in writing were, by mistake, contrary to the concurrent testimony of all parties. Lastly, it was said by Lord ELDON, in the case of The Marquis of Townsend *v.* Stangroom, 6 Vesey, 328, that it would be very singular, if the jurisdiction of the Court should not be capable of being applied to cases of mistake and surprise, as well as of fraud. He owned that those who undertook to rectify an agreement, by showing a mistake, undertook a task of great difficulty, but he could not say the evidence was incompetent, though it was not possible to reconcile all the cases on this question.

The cases concur in the strictness and difficulty of the proof, but still they all admit it to be competent, and the only question is, Does it satisfy the mind of the Court? Lord HARDWICKE said, it must be proper proof, and the strongest proof possible; and Lord THURLOW, that it must be strong, irrefragable proof; and, he said, the difficulty of the proof was so great, that there was no instance of its prevailing against a party insisting that there is no mistake. We are now considering the question of competency, and not of the amount of the parol proof, and it appears to be the steady language of the English chancery, for the last seventy years, and of all the compilers of the doctrines of that Court, that a party may be admitted to show, by parol proof, a *mistake,* as well as fraud, in the execution of a deed or other writing.

We will next look into the cases for the application of this principle.

On bills for a specific performance of an agreement in writing, the defendant has frequently been admitted to show, by parol proof, a mistake in such agreement, and by that means, to destroy the equity of the bill.

The relief on such bills is said to rest in discretion, and if the defendant can show surprise or mistake, it makes the special performance of such an agreement unjust. The cases of Joynes *v.* Statham, 3 Atk. 388; the Marquis of Townsend *v.* Stangroom, 6 Vesey, 328; Rambottom *v.* Gorden, 1 Vesey & Beames, 165; Clowes *v.* Higginson, 1 Vesey & Beames, 524; and Flood *v.* Finlay, 2 Ball & Beatty, 9, are all to this point. But this is only one class of cases: there is another class in which the object of the parol proof is to correct mistakes in bonds, deeds of settlements, mortgages, and, generally, in all contracts and agreements, and where the proof is introduced to aid the plaintiff in his bill, as well as to aid the defendant in his defence.

Whether such proof be admissible on the part of a plaintiff who seeks specific performance of an agreement in writing, and at the same time seeks to vary it by parol proof, has been made a question. Lord HARDWICKE, in Joynes *v.* Statham, seemed to think it might be done; but such proof was rejected by the master of the rolls, in Woollam *v.* Hearn, 7 Vesey, 211, and again in Higginson *v.* Clowes, 15 Vesey, 516, and when Lord REDESDALE said, in Clinan *v.* Cooke, 1 Schoales & Lefroy, 39, that he could find no decision in which a plaintiff had been permitted to show an omission in a written agreement, by mistake or fraud, he must be understood to refer to the cases of bills for a specific performance of an agreement, which was the case then before him. There are numerous instances in which *the plaintiff* has claimed and obtained relief, by showing a mistake in the agreement; and there would be a most deplorable failure of justice, if the mistakes could only be shown and corrected when set up by a defendant to rebut an equity.

In Henkle *v.* The Royal Exchange Assurance Company, the bill was brought by the plaintiff to have a policy rectified, so as to charge the defendants after a loss, and when, without such correction, they would not be charged. The parol proof was admitted, and because the proof was insufficient and uncertain, the bill was dismissed, though without costs. In Baker *v.* Paine, the plaintiff sought, by bill, to be relieved from a mistake in articles of agreement, containing a bargain and sale of goods, and the parol proof was admitted, though objected to, and the articles were rectified. Again, in Watts *v.* Bullas, 1 P. Wms. 60, a voluntary defective conveyance of land was made good, on a bill by a person holding under it, against the heir of the grantor; and in Simpson *v.* Vaughan, 2 Atk. 31, and Crosby *v.* Middleton, Prec. in Ch. 309, and Burn *v.* Burn, 3 Vesey, 573, a mistake in a bond was shown by parol proof, on the part of the plaintiffs, and the bond amended, though in two of these cases the obligor was dead, and in the third, the lapse of time had been very great, and the party, against whom the correction was allowed, was a surety. So, in The South Sea Company *v.* D'Oliffe (cited in 2 Vesey, 377, and 5 Vesey, 601) there was a mistake in a bond, given by way of security, by inserting six instead of two months, and the party was relieved, upon evidence of mere verbal communications.

The cases of Randal *v.* Randal, 2 P. Wms. 464; of Cocking *v.* Pratt, 1 Vesey, 400; of Rogers *v.* Earl, Dickens, 294; and of Barstow *v.* Kilvington, 5 Vesey, 593, were bills filed to rectify mistakes in settlements; in all of them proof *aliunde* was admitted, though the admission was resisted; and, in two of the cases, by the defendant, who claimed as heir against the mistake.

Defects in mortgages, contrary to the intention of the parties, have also been made good against subsequent judgment creditors, who came in under the party, who was bound in conscience to correct the mistake. 2 Vern. 565, 609; 1 Eq. Cas. Abr. 320, pl. 1; 1 P. Wms. 279.

It has been said, that there was no instance of a mistake corrected in favor of a plaintiff, against the answer of defendant, denying the fact of mistake. But I do not understand any of the *dicta* on this point to mean, that the answer, denying the mistake shuts out the parol proof, and renders relief unattainable, however strong that proof may be. The observations of Lord ELDON, in the case of The Marquis of Townsend *v.* Stangroom, certainly imply no more, than that the answer is entitled to weight, in opposition to the parol proof; but it certainly can be overcome by such proof. In that very case, the answer denied the mistake, yet parol proof was held admissible. The lord chancellor only said, that the evidence must be taken with *due regard being had to the answer,* and that it must not be forgotten, to what extent the answer of one of the parties admits or denies the intention. Lord THURLOW said, that there was so much difficulty in establishing the mistake, to the entire satisfaction of the Court, that it had never prevailed against the answer denying the mistake. I am not inclined, on light grounds, to contradict such high authority, but, as I read the case of Pitcairn *v.* Ogbourne, 2 Vesey, 375, before Sir JOHN STRANGE, the bill was to be relieved against an annuity bond, and to reduce the sum of 150*l.* to 100*l.*, according to the original understanding and agreement of the parties. The answer denied positively all the circumstances, and every particular of the private agreement, and parol proof, by several witnesses, was objected to and admitted, which falsified the answer, and made out the real agreement to the satisfaction of the Court, and though relief was not granted, it was refused upon other and distinct grounds no ways connected with the question, as to the competency and effect of the proof.

It is the settled law of this Court, as was shown in the case of Boyd *v.* McLean, 1 Johns. Ch. Rep. 582, that a resulting trust may be established by parol proof, in opposition to the deed, and in opposition to the answer denying the trust. There is no reason why the answer should have greater effect in this than in that case, and there would be manifest inconsistency in the doctrines of the Court, if such a distinction existed. The case of Marks *v.* Pell, 1 Johns. Ch. Rep. 58-9, which was referred to by the defendant's counsel, admitted, that parol proof

of mistakes was competent; and it was held not to be sufficient, in that case, because it consisted of naked confessions of a party, made seventeen years after peaceable possession, under a deed. The confessions, in that case, were also of a negative kind, and deduced from tacit acquiescence: the party who made them was dead, and the possession had been, for thirty years, under the deed, and there were no corroborating circumstances in aid of the confessions. Surely there is nothing to be drawn from that case, in opposition to the competency of the proof in this.

We have a strong case on this subject, in Washburn *v.* Merrills, which was decided on the equity side of the Supreme Court of Connecticut, in 1801. 1 Day's Cas. in Error, 139. A mortgagor, in that case, made, by mistake, in 1784, an absolute deed, which he did not discover until some time after. The mortgagee got into possession, and, in March, 1801, sold to a purchaser, by a deed with covenant of warranty. In August, 1801, a purchaser under the mortgagor filed his bill, or petition, against the purchaser under the mortgagee, to redeem. The answer set up the statute of frauds as a defence; and, on the trial, parol proof of the mistake was offered by the plaintiff, objected to and admitted, and the deed established as a mortgage, and a right of redemption decreed. This decree was afterwards unanimously confirmed in the Court of Errors of that state.

My opinion, accordingly, is, that the parol proof, in this case, was competent and admissible, and that it establishes, most clearly and conclusively, the fact of the mistake, as charged in the bill.

I am, also, of opinion, that there is no acquiescence here to bar the plaintiffs. Mrs. Mann was but a trustee for one of the plaintiffs, then an infant; and it is in proof, that when she discovered the mistake, she communicated the fact, as early as 1806, to Joseph Harris, who called upon her, as agent for the defendant, when she told him of her intention to commence a suit in this Court. She died in 1814, and the present suit, by the *cestui que trust,* was commenced with all due diligence. There is no pretext for the suggestion of any delay, or acquiescence, injurious to the just rights of the plaintiffs. Courts have been liberal on this head. A mistake was rectified, after seven years' acquiescence, in East *v.* Thornbury, 3 P. Wms. 126, and if Lord HARDWICKE refused it in Bell *v.* Cundall, Amb. 101, it was after a lapse of forty-four years, and where there was a purchaser without notice.

Nor has the defendant any equitable claim for compensation for his improvements made upon those fifty acres. They were made by him after he knew of the mistake, and had declared his intention to take advantage of it, and fraudulently carried that intention into effect. Such an allowance would be confounding all moral distinctions, and be giving countenance and sanction to the most flagrant injustice.

I shall, therefore, decree, that the defendant release and convey to the

plaintiffs, with proper covenants against his own acts, the fifty acres leased to Jonathan Cable, and possessed by him, and that he pay the costs of the suit. Decree accordingly.[1]

WHEELER *v.* SMITH.

IN THE SUPREME COURT OF THE UNITED STATES, 1850.

[9 *Howard* 55.]

The complainant executed a release to the executors of his uncle's will induced thereto by the executors, who assured him that the bequest to trustees for the city of Alexandria, in Virginia, was a valid bequest; whereas, the bequest was void for vagueness and uncertainty. Upon discovering that the bequest was void, and that he, as heir at law, was entitled to his uncle's estate, the complainant, Wheeler, filed his bill praying that the release be set aside as inoperative and void.

Mr. Justice MCLEAN delivered the opinion of the court.[2]

It appears from the bill, that the complainant resides in the State of Pennsylvania, and that so soon as he could raise the means of paying his expenses, after he heard of the death of his uncle, he came to Alexandria. He had an interview with the executors, and stated to them his

[1] In Snell *v.* Insurance Co., 1878, U. S. 95, 89, Mr. Justice HARLAN said for a unanimous Court: "That a court of equity can afford relief in such a case, is, we think, well settled by the authorities. In Simpson *v.* Vaughan, 12 Atk. 33, Lord Hardwicke said that mistake was 'a head of equity on which the court always relieves.' In Henkle *v.* Royal Exchange, 1 Ves. Sen. 318, the bill sought to reform a written policy after loss had actually happened, upon the ground that it did not express the intent of the contracting parties. The same eminent judge said: 'No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contract, so that if reduced to writing contrary to the intent of the parties, on proper proof would be rectified.' In Gillespie *v.* Moon, 2 Johns. (N. Y.) Ch. 585, Chancellor KENT examined the question both upon principle and authority, and said: 'I have looked into most, if not all, of the cases in this branch of equity jurisdiction, and it appears to me established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing founded in mistake or fraud. The mistake may be shown by parol proof and the relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defence.' In the same case he said: 'It appears to be the stead languages of the English Chancery for the last seventy years, and of all the compilers of the doctrines of that court, that a party may be admitted to show, by parol proof, a mistake, as well as fraud, in the execution of a deed or other writing.' And such is the settled law of this court."

[2] A part of the opinion is omitted.

determination to test the validity of the will, so soon as he should be able to employ counsel. This was before the probate of the will. Mr. Smith, one of the executors, expressing great kindness for him, was anxious to avoid a lawsuit. He did not fear the result, as the executors had been advised by counsel in whom they had confidence, that the will was valid. He represented the vexations, delays, and expenses of a lawsuit, and intimated to the complainant that the executors were willing to pay a sum of money to him if the matter could be compromised.

It appears that the complainant had been prodigal in his expenditures, and that, notwithstanding the provisions for his support which had been made for him by his uncle, he was without means and embarrassed. When the interview took place which led to the compromise, the complainant again expressed his conviction that the will was not valid, and declared that he should try its validity by legal proceedings. Mr. Taylor, one of the executors, was a distinguished lawyer, a man of high standing, and in whom the complainant reposed the greatest confidence; he represented to the complainant that he had sundry written opinions of counsel in favor of the legal validity of the residuary devise, which he offered to show to him. His conversation conveyed to the complainant "the clear and distinct impression, that there was but one opinion among the lawyers consulted, and that they were unanimous in favor of the validity of the devise." The complainant asked Mr. Taylor to state his opinion on the subject. He observed, that the complainant should not have asked him, but his opinion was, "that the devise in question was a legal and valid disposition of the residue of the estate." At the same time, he admitted that in Pennsylvania such a devise would not be good; but that it was good under the old law of Virginia.

The complainant alleges that he had no settled views of the legal question, and being disheartened by the circumstances under which he was placed, he yielded to the compromise. He had but little time for reflection, and being disheartened by the circumstances under which he was clusion to consider the devise valid, and take what he could get for a release.

Under these circumstances, the complainant agreed to the compromise. It stated the residuary devise, and that its validity had been controverted by the complainant. That "the said executors, taking on themselves the burden of the execution of said will, and of the trusts aforesaid, and the said William Wheeler, to avoid the delay and expense of litigation, and finally to settle and adjust all doubts and difficulties which might arise on the effect of the said will, so as to leave the said executors to execute the same without delay or impediment, have agreed on the following terms of compromise."

1st. That twenty-five thousand dollars shall be paid to the complainant. 2d. That the executors shall release to him all claims to any property, real or personal, conveyed or settled on complainant by the testator in his lifetime. 3d. That the complainant shall release to the

executors "all his claims, in law or equity, to the estate, real and personal, devised and bequeathed, by the said Charles Bennett by his said will, to be held and disposed of by the said executors in the manner in and by the said will prescribed. And that the said executors shall be at liberty, if any specification of the objects to which the residuary fund is to be applied be thought necessary, to apply the same to aid in finishing the Alexandria Canal, &c., and to subscribe to any railroad or other roads communicating with the said town; to any or to all of the above purposes, in such way as the said executors, or the survivors, may think most conducive to the prosperity and welfare of the town," &c.

The complainant, it seems, had studied law, but it is manifest from the facts before us, that he was but little acquainted with business, was an inefficient and dependent man, easily misled, especially by those for whose abilities and characters he entertained a profound respect. From the high character of the executors, no one can impute to them any fraudulent intent in this transaction. Looking to what they considered to be the object of the testator, they felt themselves authorized, if not bound, to effectuate his purposes by making this compromise with his heir at law. They had no personal interest beyond that which was common to the citizens of Alexandria. And we admit that they may have acted under a sense of duty, from a misconception of their power under the will.

But in making the compromise, the parties did not stand on equal ground. The necessities and character of the complainant were well known to the executors. Having the confidence expressed in the validity of the devise, they could hardly have felt themselves authorized to pay to the complainant twenty-five thousand dollars for the relinquishment of a pretended right. Nor could they have deemed it necessary, in the agreement of compromise, substantially to constitute him the donor of the munificent bequest to the town and trade of Alexandria.

We are to judge of this compromise by what is stated in the bill, the facts being admitted by the demurrer. And it appears to us that the agreement, under the circumstances, is void. It cannot be sustained on principles which lie at the foundation of a valid contract. The influences operating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely, and with a proper understanding of his rights.

The decree of the Circuit Court is reversed, the demurrer overruled, and the cause remanded for further proceedings.

ANDREWS *v.* ANDREWS.

IN THE SUPREME JUDICIAL COURT OF MAINE, 1889.

[81 *Maine* 337.]

On report. Bill in equity, heard on bill, answer and proofs. The bill was brought to reform a deed of real estate, given by the plaintiff to the defendant, October 14, 1884; the plaintiff claiming that a certain quarry, and three small lots of land were included in the description in the deed under a mutual mistake, and that they should have been excepted therefrom. The facts are fully stated in the opinion.

VIRGIN, J.[1] The plaintiff seeks to reform her warranty deed to the defendant, upon the ground that its metes and bounds include not only her homestead farm which alone she sold and intended to convey, but also, by reason of a misapprehension of its true boundaries, three other small adjoining parcels of land together with a granite ledge, all of which prior to 1867 were a part of the original farm but were severally sold and conveyed to various grantees by the original owner,—one of the plaintiff's early predecessors in title.

The office of a description of the land in a deed of conveyance is to furnish and perpetuate the means of identifying the premises conveyed. And if the language is precisely what the parties intended it to be when they adopted it, nevertheless, if back of that they through ignorance or misapprehension mistakenly believed that it correctly delineated the actual boundaries of the premises intended to be conveyed, the mistake is one of fact and not of law. Burr *v.* Hutchinson, 61 Maine, 514; Bush *v.* Hicks, 60 N. Y. 298; Baker *v.* Pyeatt, 6 W. R. 283.

To sustain her bill under the equity head of mistake, with no allegation of fraudulent or other inequitable conduct on the part of the defendant, the plaintiff must prove that the deed not only misdescribes the real estate which she sold and intended to convey, but also that which the defendant understood he purchased,—that the mistake was mutual. Butman *v.* Hussey, 30 Maine, 263; Burr *v.* Hutchinson, supra; National Trad. Bank *v.* Ocean Ins. Co., 62 Maine, 519. In other words, that when the deed was executed, both parties understood it to convey the identical land which the bill alleges it ought and would have conveyed, had not the alleged mistake occurred; and that the reformation, in some at least of the particulars alleged, is necessary in order that the deed may correctly speak the actual intention of both parties and thereby perfect and perpetuate their real agreement which the deed in its present form fails to express. Lumbert *v.* Hill, 41 Maine, 475; Adams *v.* Stevens, 49 Maine, 362; Young *v.* McGowan, 62 Maine, 56; Andrews *v.* Essex Ins.

[1] Only so much of the opinion of the learned judge is given as deals with the question of reformation.

Co., 3 Mason, 373; Kilmer *v.* Smith, 77 N. Y. 226, 232; German & Am. Ins. Co. *v.* Davis, 131 Mass. 317. For if the plaintiff only was mistaken, a reformation obviating her mistake would only result in the inequitable consequence of shifting from the plaintiff to the defendant the burden of abiding by a contract which he never made. Hence if the parties differently understood the original agreement as to the identity of the premises, the relief would take on the form of cancellation rather than reformation. Young *v.* McGowan, 62 Maine, 56, 61.[1]

[1]The learned judge found the mistake to be mutual and accordingly decreed reformation as prayed.

"An action to reform a written agreement rests upon the theory that the parties came to an understanding, but in reducing it to writing, through mutual mistake, or through mistake on one side and fraud on the other, omitted some provision agreed upon, or inserted one not agreed upon. The object of such an action is to so change the instrument, as written, as to conform it to the agreement, as made, by inserting the provision omitted, or striking out the one inserted by mutual mistake. In the absence of fraud nothing can be put in or taken out by the court, unless it was the intention of both parties that it should go in or be left out when the agreement was written. The sole office of such an action 'is to correct mistakes by writing out the contract according to the actual agreement.' Thomas *v.* Harmon, 122 N. Y. 84, 89. Equity will not make a new agreement for the parties, nor, under color of reforming one made by them, add a provision which they never agreed upon and did not want when the contract was written, 'although it may afterward appear very expedient or proper that it should have been incorporated.' When the writing expresses the actual agreement it cannot be reformed and a stipulation, not assented to, can never be added. Nevius *v.* Dunlap, 33 N. Y. 676; Bryce *v.* Lorillard Fire Ins. Co., 55 N. Y. 240, 242; Paine *v.* Jones, 75 N. Y. 593; Born *v.* Schrenkeisen, 110 N. Y. 55; Albany City Savings Institution *v.* Burdick, 87 N. Y. 40; Paine *v.* Upton, 87 N. Y. 327; Pitcher *v.* Hennessey, 48 N. Y. 415; Many *v.* Beekman Iron Co., 9 Paige 188, 195; Snell *v.* Ins. Co., 98 U. S. 85; Story's Equity Jur. § 468; Pomeroy's Eq. Jur. §§ 855, 870, 1376. The remedy of reformation for mistake should not be confounded with that of recission for fraud. No fraud is claimed in this action, and the mere fact that an instrument 'ought not to be enforced is insufficient, standing alone, to justify a resort to equity.' Beach on Eq. Jur. §§ 540, 552. 'Mistake,' said Mr. Pollock, 'does not of itself affect the validity of contracts at all. But mistake may be such as to prevent any real agreement from being formed, in which case the agreement is void; or mistake may occur in the expression of a real agreement, in which case, subject to rules of evidence, the mistake can be rectified.' Pollock on Contracts, 392. 'A mistake on one side may be a ground for rescinding a contract, or for refusing to enforce its specific provisions, but it cannot be a ground for altering its terms.' Adams Equity, 171." Curtis *v.* Albee, 1901, 167 N. Y. 360, 364.

HARRIS *v.* PEPPERELL.

IN CHANCERY, BEFORE LORD ROMILLY, M. R., 1867.

[*Law Reports,* 5 *Equity* 1.]

This was a suit by a vendor to rectify a conveyance on account of a mistake in the quantity of land therein comprised.

LORD ROMILLY, M. R. The first defence set up by the Defendant is that, in cases of mistake arising in deeds, the Court will not interfere to rectify the error unless it is clearly proved to have been common to both parties, and in support of this view the case of Earl of Bradford *v.* Earl of Romney, 30 Beav. 431, which was a decision of mine, was cited. Against this another decision of mine, in Garrard *v.* Frankel, 30 Beav. 445, was cited on behalf of the Plaintiff, where a lease was executed reserving a rent of a much less amount than was intended, and the Court interfered to relieve the lessor. These decisions may seem at first sight inconsistent, but they both appear to have been acquiesced in, and were not appealed from, and they are, in my opinion, easily reconcilable, and both correct.

Where, as in the case of Earl of Bradford *v.* Earl of Romney, there has been a settlement on marriage, and the marriage has taken place, and children have been born, then, if the Court is called upon to rectify the instrument on the ground of mistake, it is necessary for the Court to see whether it is carrying into effect the contract which was intended to be entered into on both sides, for it is impossible to undo the marriage, or to remit the parties to the same position that they were in before. In such cases, therefore, the Court acts with great caution in granting relief, and requires proof of the exact contract which both parties intended to enter into.

But the same rule does not apply in cases arising between vendors and purchasers (using these words in their widest sense). In such cases, where a deed is not actually executed, the Court will not enforce specific performance of a contract which one party has entered into under a mistake, and where, as in Garrard *v.* Frankel, 30 Beav. 445, a person supposes that he has entered into a contract for a lease at one rent, and then it turns out that the rent specified is of a different amount, then, as it is in the power of the Court to put the parties in the same position as if the contract had not been executed, the Court will interfere, provided the party aggrieved comes speedily for redress.

In the present case it is clear that the Court can put the parties in the same position as before the conveyance was executed, for if I hold that there has been a mistake, and that the deed ought to be rectified, then I can give the Defendant the option of having the whole contract annulled, or else of taking it in the form which the Plaintiff intended. It is,

therefore, a case where the Court can grant relief, and I am of opinion that the mistake was clearly proved. [His Lordship then stated the result of the evidence on this point.]

The deed, with this error in the parcels, was executed by the Plaintiff without any examination, and he did not discover it till he was on the point of selling the plot to which the piece of land in question was supposed to belong, when he discovered that it was already included in the conveyance to the Defendant.

With regard to costs in such cases, they must depend on the conduct of the parties. When the mistake is entirely owing to the conduct of the Plaintiff, then he must pay all the costs of the suit. When the Defendant has been aware of the mistake from the beginning, and refused to rectify it, then the costs must be given against him. In the present case it is clear that the Defendant, if not aware of the mistake at the time of the execution of the deed, knew it as soon as the Plaintiff told him. On the other hand, the negligence on the part of the Plaintiff is inconceivable, for he allowed this additional piece of land to be in the plan, and never caused it to be examined to see whether it was correct. It is a case of gross negligence on his part, and therefore no costs can be given on either side.

There will be a declaration that the Plaintiff did not intend to convey the additional strip of land in question, and is entitled to have the conveyance rectified accordingly, with an option to the Defendant to annul the contract.

WERNER *v.* RAWSON.

IN THE SUPREME COURT OF GEORGIA, 1892.

[89 *Georgia* 619.]

Action by Mrs. Werner against Rawson, to recover possession of certain real estate, and for the restoration of a deed (by the establishment of a copy or by requiring the execution of one similar) which Rawson had executed and which conveyed to her the property in question. The defendant pleaded that the deed was executd as the result of a mistake or misunderstanding between himself and the plaintiff's brother, Simon, who negotiated with him in the purchase and sale of the property; and hence he prayed that the deed be rescinded and set aside. By amendment he alleged that Simon by design had the deed so prepared as to convey the property in question, embracing two houses and lots, for the consideration named by the defendant in the negotiation as the price of one of them, so as to entrap him into signing the same. The jury found for the defendant, and that the contract be rescinded. To the overruling of her motion for a new trial the plaintiff excepted.

BLECKLEY, Chief Justice.

The action was brought by Mrs. Werner to recover the land and to establish a copy of the deed of conveyance which Rawson, the defendant, had executed to her and afterwards destroyed. The controlling legal question arises upon the equitable relief prayed for by Rawson in his answer, to wit: that the deed of conveyance be cancelled and set aside on the ground of mistake. The mistake, if any, was not alone in the deed, but in the contract itself, and consisted primarily of a difference of opinion or understanding as to the price at which the property was to be sold and conveyed by the defendant, Rawson, to the plaintiff, Mrs. Werner, the vendor understanding the price to be $5,000.00, and the purchaser (who contracted by her agent, Mr. Simon) understanding it to be $2,500.00. Both the consideration expressed in the deed and the amount of the check delivered in payment of the purchase money conformed to the understanding of the purchaser, so that relatively to these documents, the mistake was not mutual, but only unilateral. Relatively to the contract itself, the mistake was mutual in so far as mutuality consists of mutual misapprehension; for the vendor had one understanding of the price supposed to be agreed upon, and the purchaser another. But the case may be dealt with as one of mistake on the part of the vendor alone, which mistake, looking to the whole scope of it, consisted, first, in an honest belief that he had named $5,000.00 as the price of the property, and that the purchaser had agreed to pay it; secondly, in a like belief that such was the amount for which the check he received in payment was drawn, when in fact that amount was only $2,500.00.

1. There is a plain distinction between reforming a writing and cancelling it. Unquestionably it is true that to enable a court to *reform* an agreement evidenced by writing on the ground of mistake, it must affirmatively appear that the mistake was common to both parties, and that the writing as executed expresses the contract as understood by neither. The reason for the rule is forcibly stated by Ames, C. J., in Diman *v.* Railroad Co., 5 R. I. 134, who says: "A court of equity has no power to alter or reform an agreement made between parties, since this would be in truth a power to contract for them; but merely to correct the writing executed as evidence of the agreement, so as to make it express what the parties actually agreed to. It follows, that the mistake which it may correct in such a writing must be, as it is usually expressed, the mistake of *both* parties to it; that is, such a mistake in the draughting of the writing as makes it convey the intent or meaning of neither party to the contract. If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it as it was written by mistake, when it exactly expressed the agreement as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement of the parties as it was before; and the court would have been engaged in the singular office, for a court of equity, of doing right to one party at the expense of a precisely equal wrong to the other."

"Equity will not *reform* a written contract unless the mistake is proved to be the mistake of both parties, but may *rescind* and *cancel* a contract upon the ground of a mistake of facts material to the contract of one party only." 15 Am. & Eng. Enc. of Law, 647. The mistake "must be mutual if the complainant wishes to have the instrument *reformed* and not simply set aside, because equity cannot undertake to *reform* on the ground of the ignorance or misapprehension of *one* of the parties as to any facts, though it may rescind." Bispham's Prin. of Eq., 4th ed., § 191. So, "Cancellation is appropriate when there is an apparently valid written agreement or transaction embodied in writing, while in fact, by reason of a mistake of both or one of the parties, either no agreement at all has really been made, since the minds of both parties have failed to meet upon the same matters, or else the agreement or transaction is different, with respect to its subject-matter or terms, from that which was intended." 2 Pom. Eq. Jur., 2d ed., § 870. "A mistake on one side may be a ground for rescinding a contract, or for refusing to enforce its specific performance; but it cannot be a ground for altering its terms." Adams Eq. *171. And see Douglas *v.* Grant, 12 Ill. App. 273; Dulany *v.* Rogers, 50 Md. 524; Diman *v.* Railroad Co., *supra.* Our code, § 3124, expressly declares: "A distinction exists between reforming a contract and executing a contract in case of mistake. To authorize the former, the court must be satisfied by the evidence that the mistake was mutual; but the court may refuse to act in the latter case, if the mistake is confined to the party refusing to execute." The next section provides that, "In all cases of a mistake of fact material to the contract, or other matter affected by it, if the party complaining applies within a reasonable time, equity will relieve." Another section, 2636, declares: "Mistake of a material fact may, in some cases, justify a rescission of the contract." For some of the circumstances under which the courts have thought the complaining party entitled to relief, refer to Brown *v.* Lamphear, 35 Vt. 252, where it appeared that plaintiff unintentionally omitted from a deed conveying land to defendant a reservation of the right to use water from a certain spring; Paget *v.* Marshall, L. R. 28 Ch. Div. 255, where plaintiff, in executing a lease of certain buildings, included therein by mistake a warehouse he had intended to reserve for his own use, which he had refused to rent, but which defendant claimed to be included in the offer he had accepted; Harris *v.* Pepperell, L. R. 5 Eq. 1, where the plaintiff included in a deed to defendant a piece of land not intended to be so conveyed; also, the similar case of Baxendale *v.* Seale, 19 Beav. 601. In Webster *v.* Cecil, 30 Beav. 62, it appeared that defendant, by letter, offered to sell certain property to plaintiff for 1250*l.*, and the plaintiff, by letter, accepted the offer. The defendant had, by mistake, inserted in his letter 1250*l.* instead of 2250*l.*, and he immediately gave notice of the error. The court refused to enforce the contract. See, also, Burkhalter *v.* Jones, 32 Kan. 5.

In view of the authorities above cited, we do not think the contention of the plaintiff in error can be maintained.[1]

[1] Balance of opinion dealing with instructions to jury omitted.

Not only does equity rescind and decree cancellation, but if the instrument has been cancelled by mistake, equity restores it. In Skip *v.* Huey, 1744, 3 Atk. 91, 93, Lord HARDWICKE said:

"There are many cases where equity will set up debts extinguished at law against a surety, as well as against a principal; as where a bond is burnt or cancelled by mistake, and much stronger, if a principal procure the bond to be delivered up by fraud, in such a case the court would certainly set it up, because he shall not avail himself of the fraud of any of the debtors."

In Langley *v.* Brown, 1741, 2 Atk. 195, 203, the same great Chancellor said: "The third ground of relief is, mistakes and misapprehensions in the drawer of deeds contrary to the design of the parties.

"And to be sure this is as much a head of relief as fraud and imposition."

In Hearne *v.* Marine Ins. Co., 1874, 20 Wall. 488, 490, Mr. Justice SWAYNE said for the court:

"The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred; Kerr on Fraud and Mistake, 419, 420.

"The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of those points. Beaumont *v.* Bradley, 1 Turner & Russell, 41-50; Marquis of Breadalbane *v.* Marquis of Chandos, 2 Mylne & Craig, 711; Fowler *v.* Fowler, 4 De Gex & Jones, 255; Sells *v.* Sells, 1 Drewry & Smales, 42; Loyd *v.* Cocker, 19 Beavan, 144. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. Rooke *v.* Lord Kensington, 2 Kay & Jonson, 753; Eaton *v.* Bennett, 34 Beavan, 196. A mistake on one side may be a ground for rescinding, but not for reforming, a contract; Mortimer *v.* Shortall, 2 Drury & Warren, 372; Sells *v.* Sells, *supra*. Where the mind of the parties have not met there is no contract, and hence none to be rectified; Bentley *v.* McKay, 31 L. J. Chancery, 709; Baldwin *et al. v.* Mildeberger, 2 Hall, 176; Coles *v.* Browne, 10 Paige, 534; Calverley *v.* Williams, 1 Vesey Jr., 211."

Perhaps there is no neater statement of the reason for relief than in the following few sentences. "If the defendants' representation of ownership related to the four lots, it was a falsehood and a fraud. If it related to the Bronx river lots, it was not so understood by the plaintiff, and he was misled by a mistake. There was thus either fraud or mistake against which equity may relieve. The defendants' mistake was that they conveyed what they did not own and did not mean to sell. The plaintiff's was that he bought what he meant to buy, but without the asserted title in his grantors. What one meant to sell the other did not mean to buy, and what one meant to buy

S. & P. PENNY *v.* MARTIN AND OTHERS.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1820.

[4 *Johnson's Chancery* 566.]

The CHANCELLOR. The facts in this case are few and simple. The plaintiffs sued the defendants, R. and M., as partners in *assumpsit*, at law, and M. only was taken. The suit was carried on, under the provision in the statute, against M., who was taken, and judgment rendered against both R. and M.; and the remedy under it is limited by the statute to an execution against the joint property of both the defendants, and the separate property and person of the one taken. On issuing execution, it was found that there was no joint property, and that M., the defendant taken, was insolvent. Since that time, the plaintiffs have discovered that the other three defendants in this suit were partners with R. and M. in the contract sued at law; and the question is, whether, upon these facts, the plaintiffs are entitled to the aid of this Court, to recover by its decrees, their demand against the dormant partners.

There is no doubt that R., who was not taken in the suit at law, can be sued upon the judgment which was rendered jointly against M. and R. This was settled by the Supreme Court in the case of the Bank of Columbia *v.* Newcomb, 6 Johns. Reps. 98, and it was strongly intimated in that case, that the defendant not taken in the original suit, would be entitled to make any defence which he might have made in his distinct individual capacity, had he been arrested in the original suit. This conclusion can work no prejudice to the plaintiffs, and it would seem to follow from the plainest principles of justice. It is equally certain that the present defendants, who now join in the demurrer, might have been sued at law in the original action. The demand is on a contract, to which it is alleged they were parties, as being dormant partners with R. and M. The omission to make them parties in the action at law, arose, according to the allegation in the bill, from ignorance of the fact that they were such partners. Is that ignorance a sufficient ground for transferring to this Court, jurisdiction of a matter properly, if not exclusively, cognizable at law? The ignorance might have been removed by due vigilance and inquiry, and perhaps by the assistance of a bill of discovery here. The plaintiffs have no particular equity entitling them to relief. Ignorance, as Lord LOUGHBOROUGH said, is not a mistake. They never inquired whether R. and M. had secret partners, and they gave the whole credit to them. If they have now got into embarrassment and

the other did not mean to sell." Per FINCH, J., in Crowe *et al.* v. Lewin, 1884, 95 N. Y. 423, 426.

difficulty, in respect to their legal remedy, by pursuing the ostensible partners at law, without such inquiry. I do not know of any principle that will authorize this Court to take jurisdiction of a case where the remedy was, in the first instance, full and adequate at law, because the party may have lost that remedy by ignorance, founded on negligence, not on accident, or mistake, or on any misrepresentation or fraud. Generally speaking, a jurisdiction does not arise here from the mere circumstance that a party has omitted to make a proper case at law. There is no such head of equity jurisdiction. The general rule is, that if the party becomes remediless at law by negligence, he shall not be relieved in equity. He must show that he has been deprived of his legal remedy by accident, casualty, misfortune, &c. 1 Fonb. Tr. b. 1 ch. 3. sec. 3, § 3.

It is to be observed, that here are no special circumstances disclosed by the bill. We have only the naked fact, that the plaintiffs discovered, since the judgment at law, that the defendants were partners; but whether they were kept in ignorance by undue means, or took any previous steps to remove it, does not appear, and is not, therefore, to be presumed. Whether they have, or have not, lost their remedy at law, (and on which I give no opinion,) the demurrer must be pronounced to be well taken, and the bill dismissed, without costs.

Decree accordingly.[1]

SECTION 3. FRAUD.

This court can certainly relieve against all kinds and species of fraud.

Fraud may either be *dolus malus,* a clear and express fraud, or fraud may arise from circumstances, and the necessity of the person at the time.

There are also hard unconscionable bargains, which have been construed fraudulent. Barnardiston *v.* Lingwood, *post.* 2 vol. 133. Gwyne *v.* Heaton, 1 Bro. Cha. Rep. 10. *Sed vide* Willis *v.* Jernegan, *post.* 2 vol. 251, and there are instances where even the common law hath relieved for this reason expressly.

James *v.* Morgan, 1 Lev. 111, was a case of this kind. *Assumpsit* to pay for a horse, a barley corn, a nail, and double every nail, and avers that there were 32 nails in the shoes of the horse, which, doubling each nail, comes to 500 quarters of barley; and upon *non assumpsit* pleaded, the cause being tried before Mr. Justice *Hide* at Hereford; he directed the jury to give the value of the horse in damages, being 8l. and so they

[1] The learned Chancellor subsequently quoted as authority Willings & Francis *v.* Consequa, 1816, 1 Peters' C. C. 301.

So in Craft *v.* Dickens, 1875, 78 Ill. 131, Equity refused to reform an attachment bond for mistake, as the bond might have been corrected at law.

did; and it was afterwards moved in arrest of judgment upon a slip in the declaration which was overruled and judgment given for the plaintiff.

But this court will relieve against presumptive fraud, so that equity goes further than the rule of law, for there fraud must be proved, and not presumed only.

To take an advantage of another man's necessity, is equally bad, as taking advantage of his weakness, and in such situation, as incapable of making the right use of his reason, as in the other.

In the marriage-brocage bonds, one of the parties to the marriage only is deceived and defrauded, and not either of the parties to the marriage-brocage bond, and yet the court have relieved, for they hold it infected by the fraud, and relieve for the sake of the publick, as a general mischief.

In like manner, where a debtor enters into an agreement with a particular creditor, for a composition of 10s. in the pound, provided the rest of the creditors agree, and this creditor at the same time makes a private clandestine agreement for his whole debt, and though no particular fraud to the debtor, yet as it is a fraud on the creditors in general, who entered into the agreement, on a supposition the composition would be equal to them all, the court has relieved. Surrett *v.* Spiller, *ante* 105. 2 Ves. 156. See Middleton *v.* Onslow, 1 P. W. 768.

So in bargains to procure offices, neither of the parties is defrauded or unapprized of the terms, but it serves to introduce unworthy objects into publick offices; and therefore, for the sake of the publick, the bargain is rescinded.

Political arguments, in the fullest sense of the word, as they concern the government of a nation, must, and have always been of great weight in the consideration of this court, and though there may be no *dolus malus,* in contracts as to other persons, yet if the rest of mankind are concerned as well as the parties, it may properly be said, that it regards the publick utility.

In the cases before this court, there have been sometimes proof of actual fraud, such as Berney *v.* Pitt, the Earl of Ardglass *v.* Muschamp, and several others.

In these cases too, fraud has been constantly presumed, or inferred from circumstances, and conditions of parties; weakness and necessity on one side, and extortion and avarice on the other, and merely from the intrinsic unconscionableness of the bargain.

The next kind of deceit is, upon other persons who were not parties, as ancestor and father, and the heir and expectant, where by contrivance an heir or a son have been kept from disclosing his affairs to a father, or other relation, and by that means prevented from being set right, and undeceived; and the ancestor or father, have likewise been seduced to leave their fortunes, to be divided among a set of dangerous persons, and common adventurers.

Per Lord HARDWICKE in Chesterfield *v.* Janssen (1750,) 1 Atkyns, 314, 351-353.

THYNN *v.* THYNN.

IN CHANCERY, BEFORE LORD KEEPER GUILFORD, 1684.

[1 *Vernon* 296.]

The case was, that Mr. Thynn, of Eagham, deceased, having made a will, and thereby made his wife sole executrix; the defendant Mr. Thynn the son, hearing of this will, came to his mother in the life-time of his father, and persuaded her, that there being many debts, the executorship would be troublesome to her; and desired that he might be named executor; for that he by reason of his privilege of Parliament could struggle the better with the creditors, and persuaded his mother to move his father in it; declaring, that he would be only an executor in trust for her: and the mother accordingly prevails on the father that it might be so: and thereupon Mr. Thynn the son gets a new will drawn, whereby a legacy of 50l. only is given to his mother, and therein he makes himself sole executor; and cancels the former will, though the father opposed the doing thereof; and the last will was read over so low, that the testator could not hear it; and when he called to have it read louder, the scrivener cried, he was afraid of disturbing his worship. The defendant having thus made himself sole executor, and procured this will to be executed, where only a legacy of 50l. was given to his mother, set up for himself, and denied the trust for his mother: and in his first two answers he denied the will was drawn by his directions, and that the 50l. therein given to his mother was without the testator's privity; but in his third answer he confessed it.

Upon the whole matter, it appearing to be, as well a fraud, as also a trust, the Lord Keeper, notwithstanding the statute of *frauds* and *perjuries,* (The statute seems to relate only to trusts concerning lands and hereditaments, vide stat. 29 Car. II. cap. 3. Vide Devinish *v.* Baynes, Pre. Ch. 3. Selwyn *v.* Selwyn, 11 Dec. 1758, before HENLEY, Lord Keeper, L. I. Hall,) though no trust was declared in writing, decreed it for the plaintiff, and ordered that the defendant should be examined on interrogatories for discovery of the estate. The defendant was to pay costs to the hearing, to be taxed by the Master out of his own estate, not to wait the taking the account, Reg. Lib. 1684, B. fol. 259.[1]

[1] "Should an heir, or personal representative, whose interests would be affected by the regular insertion of a bequest in a will, induce the testator to omit making a formal provision for an intended object of his bounty, by assurances that the testator's wishes shall be as fully executed as if the bequest were formally made, this promise and undertaking will raise a trust, which, though not available at law, will be enforced in Equity on the ground of fraud. Chamberlain *v.* Agar, 2 Ves. & Bea, 262; Mestaer *v.* Gillespie, 11 Ves. 638; Strickland *v.* Aldridge, 9 Ves. 519; Chamberlaine *v.* Chamber-

BAWDES *v.* AMHURST.

IN CHANCERY, BEFORE LORD CHANCELLOR COWPER, 1715.

[*Precedents in Chancery* 403.][1]

On the plaintiff's application in way of marriage to his new wife, the defendant's sister, her father proposed to give her a portion of 4500l. and the plaintiff proposed to settle on her, by way of jointure, a rent charge of 450l. *per ann.* and in order thereunto, the plaintiff and the young lady's father went to Mr. Minshull's chambers in the Temple, who was to draw the settlement, as counsel for the lady, and Mr. Minshull hearing the proposals on both sides, took down minutes or heads thereof in writing, and the same day gave them to his clerk, to draw articles according to the substance thereof: the next day the young lady's father was taken ill suddenly, and died in about two hours after: The next morning the plaintiffs intermarried, and now brought this bill to compel a specific execution of the marriage agreement, and to have the portion paid. The defendant pleaded the Statute of Frauds and Perjuries, and on arguing that plea, the benefit thereof was saved to the hearing.

It was now argued by Mr. Cooper and Mr. Vernon for the plaintiffs, that this was such an agreement as a court of equity might well carry into execution; that the statute did not require all agreements to be signed by the parties themselves, but if they were signed by any one lawfully authorized thereto, it was sufficient; that here Mr. Minshull had authority and directions from both parties to draw the articles; that he took down these minutes or heads from the parties' own mouths; and reduced them into writing; and that therefore this could not be looked upon as a parol agreement, or any danger of perjury, since there was a writing of it, nor could there be any variety of evidence concerning it; for the same reason, that in the case of Mascall and Cooke, 2 Vern. 200. S. C., in this court, where only a draught of a marriage settlement was prepared, and before it was ingrossed the parties intermarried, and the father was present, and gave the wedding dinner, he was afterwards decreed to pay the mar-

laine *v.* Chamberlaine, 2 Freem. 34; Oldham *v.* Litchford, 2 Freem. 285. And such an engagement may be entered into, not only by words, but by silent assent to such a proposed undertaking, which will equally raise a trust. Bryn *v.* Godfrey, 4 Ves. 10; Paine *v.* Hall, 18 Ves. 475. Of course, the case would be still stronger if the insertion of the bequest in the will had been prevented by any violent interference. Dixon *v.* Olmius, 1 Cox, 414." Barrow *v.* Greenough, 1796, 3 Ves. 152 (note Sumner's edition).

[1] 1 Eq. abr. 21, pl. 8. S. C. 2 Chan. Rep. 284. S. C. Gilb. Chan. 238. Antè, 208. 374. 380. Post, 526. 536. Vid. Lord HARDWICKE'S observation upon this case, 2 Atk. 504.—Reporter's Note.

riage portion, though the agreement was never signed by either party; that in several cases, though there be nothing of the agreement reduced into writing, yet it has been decreed to an execution in this court; Antè, 208. 364, as if a man, by his answer, confesses the agreement as charged in the bill, he cannot avoid it, by insisting it was never reduced into writing, because, when he himself confesses it, there can be no danger of perjury or cantrariety of evidence; no more can there be in this case, when there is a writing or memorandum of the substance.

But it was argued on the other side, and decreed to be no such agreement as this court could carry into execution; and my Lord Chancellor said, he had been always tender in laying open that wise and just provision the parliament had made; that the act had not only directed such agreements to be in writing, as if that alone were sufficient, but went further, and directed them to be signed by the parties themselves, or some other lawfully authorized by them for that purpose; that to obviate the pretence of such and such cases being out of the mischief of the statute, the parliament had in general words comprehended all, and directed that all agreements should be in writing, and signed by the party; that he knew no case where an agreement, though it were all written with the party's own hand, had been held sufficient, unless it had been likewise signed by the party, and said, that the party's not signing it was an evidence that he did not think it compleat; that he had left it to an after consideration, and might afterwards make alterations or additions in it; and therefore, unless it were either signed by him, or something equivalent done, to shew that he looked upon it as compleated and perfected, he thought such writing by the party himself was not sufficient to bind him within that statute, and cited the case of Mallet and Halfpenny, 1 Eq. abr. 20, pl. 6. S. C. 2 Vern. 373. S. C., where the defendant, on a treaty of marriage for his daughter with the plaintiff, signed a writing, comprising the terms of the agreement, and afterwards designing to elude the force thereof, and get loose from his agreement, ordered his daughter to put on a good humour, and get the plaintiff to deliver up that writing, and then to marry him, which she accordingly did, and the defendant stood at the corner of a street to see them go to be married, and afterwards forced the plaintiff to bring his bill in this court to be relieved; and my Lord Chancellor said, he remembered very well, that this cause was heard before the Master of the Rolls, and the plaintiff had a decree; but he said, this was on the point of fraud, which was proved in the cause, and Halfpenny walked backwards and forwards in the court, and bid the Master of the Rolls observe the statute, which he humorously said, *I do, I do.* And in the principal case it was decreed to be no agreement, which this court could carry into execution, being only preparatory heads, which were afterwards to be drawn into form, and might then receive several alterations or additions, or the agreement entirely broke off, upon some further enquiry or information of the parties' circumstances.

But *Note*: It seemed to be agreed, both by the court and counsel, that if the mariage had been had upon the foot of this writing, and the father had been privy and consenting to it, that he should afterwards have been obliged to execute his part thereof.[1]

[1]In Welford *v.* Beazley, 1747, 3 Atk. 503, 504, Lord HARDWICKE "denied the general doctrine as laid down in Prec. in Chan. 402. Bawdes *v.* Amhurst, though true as applied to that case by Lord Cowper" on the ground "that the writing there, though in the father's hand, was only a sketch of an agreement not settled or confirmed by the parties."

In Wooldridge *v.* Scott, 1879, 60 Mo. 669, 673, SHERWOOD, C.J., said: "It seems to be thought by counsel for plaintiff that the desired feature capable of taking this case out of the ordinary routine is furnished by what took place between the parties in the presence of Mr. Boyd. It is to the last degree doubtful whether the language itself will bear the construction placed upon it by counsel. Mr. Boyd says: 'Both parties admitted that the note due from Francis M. Wooldridge was given for a tract of land sold by Jane Chambers to Francis M. Wooldridge; that a lien was to be held on the land until the purchase-money was paid.' The admission with regard to the lien would apply as well to what took place between Jane Chambers and her vendee, as to what occurred between the latter and the plaintiff. But conceding that the language imports all that plaintiff's counsel claims, that the vendee was to give a lien upon the land until the purchase-money was paid, still we are met by the formidable objection presented by the Statute of Frauds. Giving the language this very favorable construction, it is quite evident that plaintiff relied on the word of the vendee to make him secure in accordance with what had been promised. If the vendee had made this with a fraudulent purpose of obtaining an advantage, and then breaking faith with plaintiff, we might be disposed to afford relief, notwithstanding the statute 'on the foot of the fraud.' Halfpenny *v.* Ballot, 2 Vernon 373. But there is no indication in this record of a fraudulent purpose on the part of the vendee, and unless this is the case the statute forms an absolute bar. Chambers *v.* Lecompte, 9 Mo. 566, and cases cited; 2 Story on Contracts, § 1466, and cases cited. And it is said that even in case of fraudulent nonperformance, where a writing was to evidence the contract, there must be an express promise to reduce the contract to writing, and not a mere parol promise to do the act agreed on, not looking to such reduction. If, as above seen, there was in the present instance neither fraud of the character spoken of, nor any contract respecting the land to be reduced to writing, the whole matter thus rested in parol and under the ban of the statute."

SIR GEORGE MAXWELL *v.* LADY MOUNTACUTE, *his wife.*

IN CHANCERY, BEFORE LORD CHANCELLOR PARKER, 1719.

[*Precedents in Chancery* 526.][1]

In this case a distinction was taken, and agreed by the court, that where, on a treaty for a marriage, or any other treaty, the parties come to an agreement, but the same is never reduced into writing, nor any proposal made for that purpose, so that they rely wholly on their parol agreement, that *unless this be executed in part,* neither party can compel the other to a specific performance, for that the Statute of Frauds is directly in their way; but if there were any agreement for reducing the same into writing, and that is prevented by *the fraud* and *practice* of the other party, that this court will in such case give relief; as where instructions are given, and preparations made for the drawing of a marriage settlement, and before the compleating of it the woman is drawn, by the assurances and promises of the man, to perform it, and after to marry him. Antè, 370, and 402. 2 Vern. 200, and 372.

So where a man treated to lend money on a mortgage, and the conveyance proposed was an absolute deed from the mortgagor, and a deed of defeasance from the mortgagee, and after the mortgagee had got the conveyance he refused to execute the defeasance, yet my Lord NOTTINGHAM decreed it against him on the fraud after the statute. 2 Atk, 98. 3 Atk. 388.

So where an absolute conveyance is made for such a sum of money, and the person to whom it was made, instead of entering and receiving the profits, demands interest for his money, and has it paid him, this will be admitted to explain the nature of the conveyance; and (2 Ventris, 361. 1 Vern. 110. 2 Vern. 332.) *a letter has been held a sufficient agreement* in writing, if it were signed by the party, to bring it out of the statute; and cited the case of Leicester and Foxcroft, Post, 560, and 1 Atk. 12, *fecùs.* Ante, 519 S. C. cited and stated, and other cases.[2]

[1] Antè, 519. Post. 533, and 560. Gilb. Chan. 244. 1 Eq. abr. 19, pl. 4. and 20, pl. 5.—Reporter's note.

[2] The above case is more amply and accurately stated by Peere Williams: it is there mentioned, that there was a letter from the husband, Sir G. Maxwell (who was defendant, and not plaintiff, as erroneously appears from the above statement), that evidenced the agreement: yet Lord Chancellor PARKER held the plea of the statute to be valid, and allowed it. 1 Wms. 618. Strange, 236, S. C. See also the case of Ayliffe *v.* Tracy, 2 Wms. 65, where it is held that a letter from the father to his daughter, by which he agrees to give her 3000l. portion, and this is not shown to the party, who afterwards married her, does not take the promise out of the Statute of Frauds.—Vid. the case of Taylor *v.* Beech, 1 Vesey, 297.—Reporter's note.

WOOD *v.* MIDGLEY.

IN THE COURT OF APPEAL IN CHANCERY, 1854.

[5 *De Gex, Macnaghten and Gordon* 41.]

This was an appeal from the decision of Vice-Chancellor Stuart overruling the demurrer of the defendant to a bill for specific performance filed by vendors of leasehold property. The ground of the demurrer was that the bill alleged no sufficient agreement in writing within the Statute of Frauds. The substance of the material statements of the bill are set out in the report of the case below, in the second volume of Messrs. Smale and Giffard's Reports, page 115.

The case made by them was that the premises were put up for sale by the directions of the plaintiffs, subject to certain printed particulars and conditions; that the defendant called upon the auctioneer, and went with him to the plaintiffs' solicitor, and that the conditions of sale were then altered and turned into an agreement for sale by private contract by the direction of the defendant, who approved of the draft so prepared, and agreed to sign it. That the auctioneer then signed the following memorandum:

"Memorandum: Mr. Thomas Midgley has paid to me the sum of £50, as a deposit, and in part payment of £1,000, for the purchase of the Ship and Camel Public-house, at Dockhead; the terms to be expressed in an agreement to be signed as soon as prepared. WILLIAM LOVEJOY.

"5th of July, 1853."

The bill alleged that the above-mentioned draft was the agreement referred to in the memorandum. It also stated that the defendant's solicitors, by letter to the auctioneers, stated that the defendant declined to enter into the agreement, and demanded back the deposit.

The demurrer was as follows: "The defendant demurs in law to the said bill, and for cause of demurrer shows that it appears by the bill that neither the agreement which is alleged by the bill, and of which the bill prays the specific performance, nor any memorandum or note thereof, was ever signed by this defendant, or any person thereunto by the defendant lawfully authorized within the meaning of the Statute of Frauds."

The LORD JUSTICE TURNER.[1] The Vice-Chancellor in his judgment says that this is a case on which different minds may arrive at different conclusions, and it is one on which my conclusion differs from his Honor's.

Upon the merits the argument is threefold. First, it is said that the defendant has so acted as to avoid signing the agreement, holding the other party bound by the agreement, and Maxwell *v.* Mountacute, Prec. in Ch. 526, is referred to on this head. But the principle of that and

[1] Only so much of the opinion is given as relates to the question of fraud.

similar cases is fraud. If a party has been guilty of fraud, beyond all doubt the court will not let him take advantage of the Statute of Frauds. All the cases referred to, including Hammersley *v.* De Biel, 12 Cl. & Fin. 45; Walker *v.* Walker, 2 Atk. 98, and Muckleston *v.* Brown, 6 Ves. 52, rest on this principle. Is there, then, a case alleged by this bill of this nature, that the defendant did by his fraudulent act prevent the agreement from being reduced to writing? I think that there is no allegation on the bill bringing forward a case of fraud. The case alleged is simply this, that there was an agreement for a sale by the plaintiffs to the defendant for £1,000, and the defendant said that he would not sign any agreement. The law has said that the defendant is not to be sued unless upon an agreement signed by him. Is it a fraud on that law for him to say, I have agreed, but I will not sign an agreement?

The demurrer must be allowed.

The Lord Justice Knight Bruce concurred.

LEE PEEK *v.* NETTIE A. PEEK.

In the Supreme Court of California, 1888.

[77 *California* 106.]

Appeal from a judgment of the Superior Court of San Bernardino County, and from an order refusing a new trial.

The facts are stated in the opinion.

Hayne, C. Ejectment, with a cross-complaint by defendant praying for a conveyance of the legal title. The facts are as follows:

One L. R. Peek orally promised the defendant that if she would marry him he would, on or before the marriage, convey to her the property in controversy. She relied upon this promise, and married him "for no other reason or consideration." The conveyance was not made. He put it off by excuses and protestations, and on the morning of the marriage, without the knowledge of defendant, conveyed the property to his son by a former marriage, who was then a boy about ten years old. The marriage with defendant did not prove a happy one, and after a year's residence upon the property, Peek deserted the defendant, and the son, Lee Peek, brought the present action to recover possession of the property. The court below gave judgment for the plaintiff, and the defendant appeals.

The foundation of the defendant's claim being the promise of L. R. Peek, the first question to be considered is whether such promise was of any validity. It is clear that it was within the Statute of Frauds. But it is contended that there was such part performance and fraud as

would induce a court of equity to give relief, notwithstanding the statute.[1]

We think that if the actual fraud of L. R. Peek be left out of view, there was no such part performance as would take the case out of the statute. There may undoubtedly be cases of a part performance of oral antenuptial agreements sufficient to warrant their enforcement in equity. See Neale *v.* Neale, 9 Wall. 1. But it seems to be generally agreed that the marriage alone does not amount to such part performance. See Atherly on Marriage, 90; Browne on Statute of Frauds, 4th ed., § 459; Henry *v.* Henry, 27 Ohio St. 121. With reference to this subject, Story says: "The subsequent marriage is not deemed a part performance, taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case standing on its own grounds." 1 Story's Eq. Jur. § 768. Nor does the fact that the defendant resided with her husband upon the property make any difference. The reason assigned for holding possession to be part performance is, that unless validity be given to the agreement the vendee would be a trespasser. But it is manifest that this reason would not apply where the vendor was the husband and the vendee the wife, living with him upon the property. The possession which is referred to by the cases which hold it to be sufficient part performance is a possession exclusive of the vendor. Browne on Statute of Frauds, 4th ed., § 474.

But the fact that the marriage was brought about by the actual fraud of L. R. Peek seems to us to make a difference. There can be little doubt upon the record that there was actual fraud on his part. He denies that he made any promise to convey the property in controversy. But the court finds that he did make it, and taking this to be the fact, we think that the defendant's account, as to the time of the promise and of the reason she married him without the conveyance, must be accepted as the true one. According to her testimony, the promise was repeated up to the time of the marriage, and she was induced to have the ceremony performed before the conveyance was executed by means of excuses and protestations which must have been made for the purposes of deceiving her. On the day before the marriage he pretended that he was going to have the deed executed at once. He said to the defendant: "The officers are in town that are required to draw up the papers. Come to-night and I will have the place deeded to you, and the fifteen thousand dollars put in your name. He left me in the hotel, and in a few minutes he came and told me that Mr. Frank McKenny was out of town, and it could not be attended to that evening." The next day, "he said he would have the deeds drawn, and he went up and said that they were all busy at the court-house, and he couldn't have it done at that time, and he called on me again with the same story—that the gentlemen at the court-house were busy, and that he could not have the deeds fixed, and that I could rest contented." He, however, succeeded

[1] Only so much of the opinion is given as relates to this question.

in inducing the defendant to marry him that evening, by protesting that the papers should be executed as soon as practicable. After the marriage he kept up for a short time the pretense that he was going to fulfil his promise, but never did so.

It seems clear that he never intended to have the deed executed. The story that he could not have it done because the officers at the court-house were busy is ridiculous. On the very day that he was making this excuse, he got a deed executed, conveying the property to his son. And the fact that he induced the defendant to marry him by promising to convey the property to her, when at that very time he was conveying it to somebody else, seems conclusive as to his fraudulent intent. We think, therefore, that the conclusion of the court below that the deed was not made "with any fraudulent intent whatever" is not sustained by the facts.

This fraud on the part of L. R. Peek, by which he induced the defendant to irretrievably change her condition, seems to us to be ground for relief in equity. It has been laid down that if the agreement was intended to be reduced to writing, but was prevented from being so by the fraudulent contrivance of the party to be bound by it, equity will compel its specific performance. 1 Story's Eq. Jur. § 768; Atherly on Marriage, 85. And the recent case of Green *v.* Green, 34 Kan. 740; 55 Am. Rep. 256, is exactly in point. In that case a widow, owning 160 acres of land, orally promised a man that if he would marry her she would devote the proceeds of the land to their joint support. Relying upon this promise he married her, but subsequently ascertained that on the eve of the marriage she had conveyed the property to her children by former marriage, "in consideration of love and affection." The court held that he could maintain an action to have the deed set aside on the ground of fraud. Compare also Petty *v.* Petty, 4 B. Mon. 215; 39 Am. Dec. 501.

We do not say that the mere fraudulent omission to have an agreement reduced to writing would of itself be ground for specifically enforcing the agreement. But where the fraudulent contrivance induces an irretrievable change of position, equity will enforce the agreement. And the marriage brought about by the fraudulent contrivance is a change of position within the meaning of the rule. In Glass *v.* Hulbert, 102 Mass. 24; 3 Am. Rep. 418, in reasoning upon somewhat different facts, to the conclusion that, in order to be ground for the enforcement of the oral contract, the fraudulent contrivance must have induced some irretrievable change of position, the court said: "The cases most frequently referred to are those arising out of agreements for marriage settlements. In such cases the marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irretrievable change of situation, that if procured by artifice, upon the faith that the settlement had been made, or the assurance that it would be executed, the other party is held to make good the agreement, and not

permitted to defeat it by pleading the statute." This, we think, is a correct statement of the law.

We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

BELCHER, C. C., and FOOTE, C., concurred.[1]

REIGAL *v.* WOOD.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1815.

[1 *Johnson's Chancery* 402.]

The bill which was for an injunction, stated, that on the 23d of January, 1801, the plaintiffs purchased of John Smith, 200 acres of land in lot No. 54, in the township of Manlius, for 1,900 dollars. That the land was then subject to a mortgage by Smith to Michael Myers, for 800 dollars, which the plaintiffs paid to Myers, who agreed that the mortgage might remain for their use, and to secure their title. The plaintiffs took possession of the land, which they divided equally between them. That, in June, 1810, the plaintiffs were informed that Thaddeus M. Wood, defendant, had caused the land to be sold, at the sheriff's sale, under a judgment in the name of Daniel Avery, (defendant,) against John Smith and Aaron Wood, obtained 13 or 14 years ago, in the Onondaga court of common pleas, on a promissory note for sixty dollars, for goods sold by Avery, as trustee, to one Dickout, an absconding debtor. That the defendants, T. M. Wood and George Hall, purchased the land at the sheriff's sale. That the plaintiffs applied to Wood on the subject, who, at first, agreed to accept 40 dollars on the judgment, and release the purchase, but afterwards demanded payment of another judgment against John Smith, in favour of Peter Smith, for 300 dollars, which Wood alone, or inconjunction with two of the defendants, Isaac and John Delamater, had before purchased off Peter Smith. That the plaintiffs, through ignorance, yielded to the terms demanded, and gave Wood their bonds and mortgages on the premises, for 308 dollars, payable in a short time, with interest. The sum being divided into four equal parts, for which four bonds were given, and Wood and Hall released their claim to the land to each of the plaintiffs separately. That, afterwards, on inves-

[1] And see the interesting case of Green *v.* Green, 1886, 34 Kas. 740, in which the defendant—a widowed woman—persuaded the one armed plaintiff to marry her solely, it would seem, upon the promise to convey to him land which after marriage she conveyed to other parties in trust for the children by her former marriage.

tigation, the plaintiffs found that John Smith, after the judgment against him, in favour of Avery, had paid the amount of the judgment to John Rappelye, the creditor who had instituted the proceedings against Dickhout, and had paid, in boards, the costs to Wood. That Wood, in order to overreach the purchase of the land by the plaintiffs, had caused the judgment to be revived by *scire facias,* without the knowledge or consent of Avery or Rappelye; and that John Smith, being insolvent, aged, and having removed out of the county, did not attend to the suit. That the judgment of Peter Smith was assigned as above mentioned, with an express agreement that the land of the plaintiffs should not be affected by it, and made solely for the purpose of securing and protecting another piece of land claimed by Wood and the Delamaters. That on the revival of the judgment by the *scire facias,* Wood well knew of the purchase of the land by the plaintiffs, and their settlement thereon: that the plaintiff, Frederick Reigal, has paid off his mortgage to Wood; but the other plaintiffs being unable to pay, Wood has advertised their lands for sale, under the mortgage, and also put their bonds in suit. And the plaintiffs prayed for an injunction to stay his proceedings, and for relief, &c.

THE CHANCELLOR [KENT]. It appears to me, from a view of all the facts and circumstances attending this case, that I am bound to consider the judgment upon the *scire facias* as unduly obtained, and that the defendant cannot, in justice and good conscience, be permitted to hold any advantage which he may have obtained under it. It is a well-settled principle, in this court, that relief is to be obtained not only against writings, deeds, and the most solemn assurances, but against judgments and decrees, if obtained by fraud and imposition. Barnesly *v.* Powell, 1 Ves. 120, 284, 289.

Wood, the principal defendant, admits, in his answer, that when he undertook to revive the judgment of Avery & Bennet *v.* Smith & Wood, there was but 3 dollars and 96 cents of the debt due. His object, certainly, was not that small balance; and it does not even appear that, as to that sum, he had any direction to issue the *scire facias,* from the persons in whose names it was issued, or to whom the money was due. It is evident his object was to secure another and larger demand against Smith, totally unconnected with the judgment, and that, as Smith was insolvent, as well as old, blind, and helpless, he sought to secure this demand by a contrivance calculated to defeat the title of the unsuspecting purchasers holding lands under Smith. It is in proof, that he knew that Smith had conveyed his interest in lot 54, in Manlius, to third persons; and the interference is irresistible, from his frequent intercourse with that town, that he knew that the land was in the actual occupation of the purchasers, and had received large and valuable improvements. No notice, however, is given to them, as ter-tenants, of the *scire facias.* We have reason to presume it was intentionally avoided, and he is content with a service of the writ on that very old and blind pauper, who had

neither interest nor disposition to take care of the suit, and who, about that time, had gone, or removed, to a distant county. A verdict is, accordingly, obtained upon the *scire facias,* without any opposition from Smith's uninstructed counsel, for the whole amount of the original judgment, though he knew, at the time, that it had long before been nearly, if not entirely discharged. He issues his execution, and directs the whole of the judgment to be levied; and the sheriff, under his direction, sells, not upon the premises, but in another town, all the lands of the present plaintiffs, and which had cost them, eight years before, near 2,000 dollars. This sale, as well as the previous proceedings, was unknown to the plaintiffs, and the lands were bid off by a partner of Wood, for his use, at a nominal sum. This partner says, that he bid to save the debt of him and Wood, and which, as it appears, consisted chiefly of an antiquated account of costs and charges, as attorneys for Smith. Having thus acquired a title, Wood imposes terms upon the plaintiffs as the previous owners of the land. He insists upon the payment of the principal part of his demand against Smith, and compels them to redeem their land by giving him bonds and mortgages to the amount of 308 dollars. Smith denies that any part of the demand is due; and whether it be so or not, the settlement cannot be binding upon the plaintiffs; for the same imposition which attended the judgment, also infected this settlement, as it was made by them, totally uninformed of their rights, and in ignorance of the fraud by which the judgment was procured.

I think the weight of evidence is, that the whole of the original judgment, costs as well as debt, had long before been satisfied. Smith testifies that he had paid not only the small balance of the debt, but the costs, in boards; and another witness (Hall) says, that Wood had the benefit of some boards upon some claim which Wood had against Smith; and in the account exhibited by Wood, in this cause, he gives no credit, and makes no mention of the boards.

I am of opinion, therefore, that Wood cannot be permitted to acquire and hold any advantage whatever under the judgment obtained upon the *scire facias,* and that the whole proceeding was an imposition upon the plaintiffs. I shall accordingly decree, that the bonds and mortgages mentioned in the pleadings be given up and cancelled, and that the money which has been paid upon one of the bonds and mortgages be refunded, with interest; and that the defendant, Wood, pay the costs of this suit; and that the bill, as to the other defendants, be dismissed without costs.

Decree accordingly.

BARROW *v.* RHINELANDER.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1815.

[1 *Johnson's Chancery* 550.]

THE CHANCELLOR [KENT]. This is a strong and peculiar case, which calls for relief. There appears to be very great reason to presume an abused confidence. The defendant was the confidential clerk of Prior, and kept his cash accounts, and had free access to all his papers and moneys. From the beginning almost of their connection, Prior was embarrassed, and had recourse to the defendant for the loan of moneys. This created, at once, a delicate relation between the master and the servant; and the rapidity with which loans and debts were accumulated, securities exacted, the load of dependency increased, and blind and necessitous submission yielded, is distressing to learn, even as told in the defendant's answer. There are two witnesses to the charge of usury; and the attempt made, by the defendant, to get rid of the charge, under the explanation of taking compound interest, is not sufficient. The defendent does not put himself upon the benefit of the settlements made from time to time, but he, in fact, opens the accounts by his answer, and admits that the entries in the cash books were generally made by him, and that they contain the evidence of his loans. There is, also, proof of mistakes and deficiencies in the cash books, and of alterations. One mistake, for instance, of a charge, by the defendant, of 500l., on the 15th of June, 1792, is not in the books. Other mistakes are alleged and shown; other instances of abused confidence are charged, as taking property from Prior, without his assent. In short, there are so many unpleasant and suspicious circumstances attending this case, leading so strongly to an inference of usury, oppression, and fraud, that it appears essential to the honour of the court, and the ends of justice, that all these multiplied settlements and obligations should be set aside, and that an account, at large, from the commencement of their dealings, should be taken and stated.

The cases cited by the counsel for the plaintiff, bear very pointedly upon the circumstances of this case, and show, that there is nothing unusual in granting the relief. Thus, in Bosanquet *v.* Dashwood, Cases temp. Talbot, 37, a bill was filed by the assignees of a bankrupt, charging the defendant's testator with lending on usury, and that agreements for that purpose were made and repeated from 1710 to 1724. It was a case of apparent extortion and oppression, and the accounts were ordered to be opened, and the demands reduced to moneys really lent, with lawful interest thereon. So, also, in Vaughan *v.* Lloyd, cited in 5 Vesey, 48, which was a case of principal and agent, and of abused influence and

confidence by the agent. A variety of deeds and settled accounts were opened, though the accounts had been settled from time to time, and the defendant insisted on the benefit of those settlements. It appeared that several sums of money were charged improperly, and the accounts were impeached in several points, and the defendant was compelled to prove his accounts though he might suffer; for the Chancellor approved of the doctrine in Piddock *v.* Brown, 3 P. Wms. 288, that where there are manifest signs of fraud, the obligee ought to be put to the proof of actual payment, and if he suffered, it was owing to his own conduct. The same decision was made in Watt *v.* Grove, 2 Schoale & Lefroy, 492, which was, also, the case of an agent availing himself of the negligence and extravagance of his principal. Indeed, the taking advantage of a man's necessities is as wrong as taking advantage of his weakness. This is not the case of merely showing mistakes and omissions in a stated account, in which the party is allowed to do no more than surcharge and falsify. Appearances wear a more serious aspect, and the whole account ought to be opened from the beginning, as was done in Vernon *v.* Vawdy, 2 Atk. 119, after a period of 23 years. I do no more in this case, than has been repeatedly done in other cases which were not more oppressive in appearance.

LIVINGSTON *v.* HUBBS.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1817.

[2 *Johnson's Chancery* 512.]

The bill charged, that Daniel Baldwin, in his lifetime, procured a deed from the plaintiff, of a house and lot, in Brooklyn, by fraudulent representations and practices; and that the defendant Hubbs was concerned with Baldwin in the fraud; and that, immediately after the deed was so procured, Baldwin confessed a judgment to Hubbs for 839 dollars, which Hubbs, shortly thereafter, assigned to the defendant Robbins, and, as the bill charged, with knowledge of the fraud.

After the answers of the defendants, the cause was put at issue, and proof taken, and the cause set down for hearing.

THE CHANCELLOR. The allegation of fraud is abundantly established; and the only point admitting of any real discussion is, how far Robbins, who appeared to be a purchaser of the judgment for a valuable consideration, and to whom no charge of fraud could be imputed, was to be protected in his *lien* on the land. Robbins purchased the judgment subject to all the equity of the plaintiff against it, while it existed in the hands of Hubbs; and as the title of Baldwin was infected with gross fraud, it

was null from the beginning. The fraudulent judgment, therefore, created no valid subsisting *lien*. The title to the land never passed from the plaintiff; and there is no rule of law, or equity, to protect the judgment in the hands of Robbins, though he may be an assignee for a valuable consideration, without notice of the fraud, for he took the assignment of the judgment at his peril. He took it subject to all the existing rights of the *debtor;* and these rights could not be varied, or affected, by the assignment, though, perhaps, the right of *a third person,* depending upon a secret trust, might be affected. Murray & Winter *v.* Lylburn and others, Ante. 441. The judgment was not an article of ordinary commerce, and it would be repugnant to justice and sound policy, to permit fraud to be successful by such a contrivance.

The land, therefore, must be decreed to be reconveyed to the plaintiff, discharged of the judgment, and a perpetual injunction awarded against the execution of the judgment upon that land.

Decreed accordingly.

HOWELL *v.* BAKER.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1819.

[4 *Johnson's Chancery* 118.]

Bill filed January 19th, 1818, to redeem land, purchased by C. Baker, defendant, at the sheriff's sale, under circumstances which, as was alleged, constituted him a trustee for P. Howell, the defendant in the execution. A judgment was recovered in September, 1809, in the Ulster Court of C. P. against P. H., at the suit of J. R. Boyd, for 112 dollars and 95 cents, in which suit C. B., the defendant, and another, were the attorneys for the plaintiff. A *fi. fa.* was issued, and in 1810, the property of P. H., being a house and about forty acres of land, was advertised for sale. On the 29th of December, 1810, P. H. paid the defendant C. B., fifty dollars, and the sale was postponed. The bill stated, that P. H. had paid the deputy sheriff, in November, 1809, 27 dollars and 50 cents, and 18 dollars on the execution, in December, 1809. The property was again advertised for sale, and sold on the 15th of May, 1812, at public auction, by the sheriff, to C. B., (who attended as attorney of the plaintiff, Boyd,) as the highest bidder, for 10 dollars. The bill stated, that P. H. had made several small payments on the judgment; and that, in 1814, he tendered to C. B. the balance due on the judgment, together with the 10 dollars paid by him, amounting, with interest, to 35 dollars and 15 cents, which he refused to accept; and that C. B. afterwards sold the

premises for 1,200 dollars, to the defendant Clark, who purchased, with full knowledge of all the circumstances. The bill prayed, that the defendants might be decreed to release the premises to the plaintiff, and deliver up the possession, etc.

The defendant B., in his answer, denied that he purchased the property with intent to hold it as security only for the balance due on the judgment, but that he purchased for his own benefit. He alleged, that he afterwards paid Boyd, the plaintiff, the balance due on the judgment; and that 80 dollars were due at the time of sale.

It appeared from the evidence taken in the cause, that the property, when it was sold at auction in 1812, was worth about 2,000 dollars; that P. H. was absent from the state at the time; that it was a stormy day, and no persons but the deputy sheriff and B. were present at the sale; that after the sale, B. frequently said, that he would give up the property to P. H. if he would pay the balance due on the judgment, and the ten dollars, and compensate him for his trouble; that he had told Boyd, the plaintiff, that he had bid off the property for him; and that the defendant C., before he purchased, knew all the circumstances.

THE CHANCELLOR. The defendant B. was one of the attorneys to the execution under which the sheriff sold the land, and it might be a question whether an attorney can, in such case, become a purchaser for his own benefit. He is the agent of the plaintiff, and generally, has the control of the execution, and may direct the time and place of sale. It is well known that the sheriff receives his instructions from the attorney, and usually follows them, under the general regulations of the statute, in pressing, or in postponing the sale, and as to the terms to be prescribed, and the particular parts of the real estate to be selected. It is dangerous to allow a person who has such a material agency in the sale, the capacity of buying in, on his own account. He who is entrusted with the business of others, ought not to be allowed to make that business an object of interest to himself. It tends to abuse and corruption. It is upon this principle that the assignees of a bankrupt are not allowed to become purchasers on the sale of the bankrupt's estate. The bringing it to sale, and the time and manner of the sale, are very much in their power. A purchase by the *solicitor* of the assignees is supposed to be within the reason of the prohibition, for he is their agent to direct the sale; and those who have a duty to perform for others, should not, in the discharge of that very duty, deal for themselves. It has accordingly been held, in England, (*ex parte* Hughes, 6 Ves. 617. *Ex parte* James, 6 Ves. 337.) that purchases of the bankrupt's estate, at public sale, by the assignees, or their agent or solicitor, are not valid, but will be considered as made in trust for the persons entitled to the surplus, and will be set aside on equitable terms. In Hall *v.* Hallet, 1 Cox, 134, Lord THURLOW observed, that "no attorney can be permitted to buy in things in a course of litigation, of which litigation he has the management. This the policy of justice will not endure."

But though the rule disqualifying trustees, and particularly solicitors and attorneys, from purchasing at sales brought about through their agency, has strong pretensions to be applied to this very case, I do not perceive it to be incumbent upon me, at present, to decide that point. The purchase by the defendant B. was made under special circumstances, which are sufficient, of themselves, (and particularly when taken in connection with his character as attorney to the execution,) to constitute him a trustee for the parties, whose interests were concerned in the sale. Boyd, who was plaintiff in the execution, directed the defendant B. to attend and bid off the property, and the defendant B. afterwards confessed to his client, that he had done so, and that the deed would be executed to Boyd. He, also, admitted to Howell, the defendant in that execution, that he had made a temporary sale of the property, to prevent the expense of further advertising it, and that he would receipt the execution as soon as it was paid up. These two witnesses establish the fact that the purchase was not intended, at the time, to be absolute, and for the benefit of B. In addition to this proof, the facts admitted by the defendant B., in his answer, that there was not above eighty dollars due on the execution, at the time of sale, *including his costs,* and that he bid only ten dollars, though he afterwards discharged the execution, and sold the farm for 1,200 dollars, lead strongly to the same conclusion.

It would be very inequitable, even if it were lawful, to allow the purchaser, in such case, to appropriate the bid to himself. *Non omne, quod licet, honestum est,* is the observation of Palus, as quoted in the Digest, 50, 17, 144, and we have a similar observation from another Paul, who received inspiration from a purer source than the Roman law, 1 Cor. vi. 12.

Indeed, such gross inadequacy of price, when taken in connection with the fact that the sale was on a stormy day, and that no persons were present but the sheriff and the defendant B., would well warrant an inference of fraud on any other ground than the one I have taken. The most reasonable conclusion, and the only one honourable to the defendant B., is, that the purchase was intentionally made, at the time, in trust for the respective interests of the parties to the execution.

Howell did nothing, afterwards, to release his right, and discharge the trust, and when B. sold to the defendant C., the right of Howell, or his assignee, to redeem the property, existed in full force.

Nor is the defendant C. entitled to protection as a *bona fide* purchaser, without notice. It is clearly established by the testimony, that he purchased with knowledge of all the material circumstances attending the purchase by B., and the right of redemption remained in full force against him. He purchased at his peril, and after being duly apprized of the infirmity of the title of B.

I shall, accordingly, decree, that the plaintiff is entitled to redeem the estate, upon paying the balance due upon the execution, with interest, after deducting all payments made by Howell to the sheriff, or to the de-

fendant B., and upon paying the amount, with interest, of all the incumbrances upon the estate existing at the time of the sale, and subsequently discharged by either of the defendants, and upon paying the cash value of all *bona fide* and substantial improvements made by the defendant C., since his purchase. I shall direct a reference to ascertain the amount of the same. Decree accordingly.[1]

ROSS *v.* CONWAY.

IN THE SUPREME COURT OF CALIFORNIA, 1892.

[92 *California* 632.]

Appeal for a judgment of the Superior Court of Sonoma County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

HARRISON, J.—The plaintiff, as the sole heir of his mother, Elizabeth G. Ross, brought this action to cancel and annul two certain deeds of trust conveying certain real estate in Santa Rosa, executed by his mother, August 11, 1888, and August 18, 1888, respectively, alleging that at the time of their execution his mother was weak in body and that her mind was impaired, and that the defendant Conway, who was the pastor of the Roman Catholic church of Santa Rosa, of which she had been for many years a member, and who was also her spiritual adviser, had thereby acquired great influence over her, and, taking advantage of such influence and of her mental weakness, had caused her to execute the said deeds of trust for the benefit of himself and of the church of which he was the pastor. The defendant denied these allegations, and the cause was tried by the court, a jury having been called in as advisory to the court upon certain issues. The verdict of the jury and the findings of the court were in support of the allegations of the complaint, and judgment was rendered in favor of the plaintiff. A motion for a new trial having been made and denied, an appeal has been taken from both the judgment and the order denying a new trial.

The two deeds of trust are substantially the same, the last one having been executed merely for the purpose of correcting an erroneous description in the first. Under the trust created by the deeds, the trustees are directed to sell one of the parcels of land "as soon as practicable," and out of the proceeds thereof apply eight thousand dollars in the improvement of the other parcel, and pay the remainder of the proceeds to the defendant Conway. Out of the income to be derived from the parcel

[1] And see further, the opinions of Chancellor KENT in the following cases: Troup *v.* Wood, 1819, 4 Johns. Ch. 228; Lupton *v.* Cornell, 1819, 4 id. 262; Chesterman *v.* Gardner, 1820, 5 id., 29.

to be improved, seventy-five dollars per month was to be paid to the plaintiff, and the remainder, monthly, "to the pastor of the Roman Catholic church in Santa Rosa, to be disbursed by him in such manner as he may deem charitable." Other provisions, contingent upon the death or change in circumstances of the plaintiff, are unnecessary to be repeated here.

The issues before the court were, in substance, whether Mrs. Ross was, at the respective dates on which the deeds of trust were executed, of weak mind, or able to comprehend the provisions of the instruments; and, whether the defendant Conway used the influence which he had acquired over her by virtue of being her spiritual adviser for the purpose of procuring her to make such disposition of her property. Upon these issues there was much conflicting evidence before the court, both in the testimony of the witnesses who were examined, as well as in the circumstances under which the instruments were executed and the purposes held by Mrs. Ross with reference to her son and to the church. Upon the evidence before it, the court found in favor of the plaintiff. This finding was in accordance with the verdict of the jury, and upon a motion for a new trial, in which the evidence was again brought before the court for consideration, it adhered to its former conclusion. Under these circumstances, we cannot disregard its finding. Inasmuch, however, as counsel have elaborately argued the facts, we have examined the record, and are of opinion that the evidence fully justifies the findings of the court.

The court finds that at the dates of the execution of the deeds of trust Mrs. Ross was of weak mind and in a dying condition, and that she died on the 20th of August; that the defendant Conway was, and had for a long time previously been, the pastor of the Roman Catholic church at Santa Rosa, and the spiritual adviser of Mrs. Ross; that a confidence was reposed in him by her, and that there existed on his part an influence and apparent authority over her arising out of his relation to her as her spiritual adviser, and that he took an unfair advantage of this influence, and used this confidence and authority for the purpose of procuring her to execute the two deeds of trust. The court also finds that Mrs. Ross had in December, 1887, executed a will of all her estate, with the exception of some minor legacies, in favor of the plaintiff herein, and that the provision in the deeds of trust for the defendants other than the defendant Conway were without any consideration from them, but were made solely through the influence of Conway.

The rule is inflexible that no one who holds a confidential relation towards another shall take advantage of that relation in favor of himself, or deal with the other upon terms of his own making; that in every such transaction between persons standing in that relation the law will presume that he who held an influence over the other exercised it unduly to his own advantage, or in the words of Lord LANGDALE in Casborne *v.* Barsham, 2 Beav. 78, "the inequality between the transacting parties is so great, that, without proof of the exercise of power beyond that

which may be inferred from the nature of the transaction itself, this court will impute an exercise of undue influence"; that the transaction will not be upheld, unless it shall be shown that such other had independent advice, and his act was not only the result of his own volition, but that he both understood the act he was doing and comprehended its result and effect. This rule finds its application with peculiar force in a case where the effect of the transaction is to divert an estate from those who by the ties of nature would be its natural recipients, to the person through whose influence the diversion is made, whether such diversion be for his own personal advantage, or for the advantage of some interest of which he is the representative. It has been more frequently applied to transactions between attorney and client or guardian and ward, than to any other relation between the parties, but the rule itself has its source in principles which underlie and govern all confidential relations, and is to be applied to all transactions arising out of any relation in which the principle is applicable. It is termed by Lord ELDON "that great rule of the court that he who bargains in any matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence." Gibson *v.* Jeyes, 6 Ves. 278. It was said by Sir SAMUEL ROMILLY, in his argument in Huguenin *v.* Baseley, 14 Ves. 300, that "the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another,"—a principle which was afterwards affirmed by Lord COTTENHAM in Dent *v.* Bennett, 4 Mylne & C. 277, saying that he had received so much pleasure from hearing it uttered in that argument that the recollection of it had not been diminished by the lapse of more than thirty years.

That the influence which the spiritual adviser of one who is about to die has over such person is one of the most powerful that can be exercised upon the human mind, especially if such mind is impaired by physical weakness, is so consonant with human experience as to need no more than its statement; and in any transaction between them wherein the adviser receives any advantage, a court of equity will not enter into an investigation of the extent to which such influence has been exercised. Any dealing between them under such circumstances will be set aside as contrary to all principles of equity, whether the benefit accrue to the adviser or to some other recipient who, through such influence, may have been made the beneficiary of the transaction. These principles have been so invariably announced whenever the question has arisen, that a mere reference to the authorities will suffice. Norton *v.* Relly, 2 Eden, 286; Huguenin *v.* Baseley, 14 Ves. 273; Thompson *v.* Heffernan, 4 Dru. & War. 291; Dent *v.* Bennett, 4 Mylne & C. 269; In re Welsh, 1 Redf. 246; Richmond's Appeal, 59 Conn. 226; Ford *v.* Hennessy, 70 Mo. 580; Pironi *v.* Corrigan, 47 N. J. Eq. 135; Connor *v.* Stanley, 72 Cal. 556; 1 Am. St. Rep. 84; 1 Bigelow on Fraud, 352; Story's Eq. Jur., sec. 311.

The finding of the court that Mrs. Ross did not have any independent advice upon the subject of making the deeds of trust is fully sustained by the evidence. It appears from the record that the attorney who prepared the instruments was introduced to her by Conway, and that the only persons with whom she had any interview, or from whom she could receive any advice respecting the same, were this attorney and the defendant Conway. On the 9th of August she had expressed to Conway a desire to make a testamentary disposition of her property, and upon his suggestion that Mr. Collins was a suitable person, she requested that he would send him to her at the hospital where she was lying. He thereupon sought Collins, and, telling him the wish of Mrs. Ross, accompanied him to the hospital. On their way he told Collins of the mode in which she proposed to dispose of her property, and, after their arrival, remained in the room with them while she was giving directions about the will, going out, however, occasionally, for short intervals, to visit other people in the hospital, and leaving the building before the will was formally executed. Two days later he visited Collins at his office, and after hearing the will read, he made to Collins a suggestion of some changes, and whether a deed of trust would not be preferable to a will. An appointment was then made between him and Collins to meet that afternoon in the room of Mrs. Ross at the hospital. After their arrival at the hospital, Conway made a suggestion to her that she execute a deed of trust instead of a will, and also other suggestions in reference to her disposition of the property. Only himself and Collins were in the room during this consultation, he, however, leaving it temporarily a few times during the period over which the interview extended, but remaining until Collins had received all the directions that she gave.

Assuming that by virtue of his relation to her he had acquired an influence over her, it must be held that in the transaction under investigation there was an undue exercise of such influence; that by not insisting that she should have independent advice, and by continuing to remain in her presence during the interview with the only other person whom he permitted to see her, he exercised an influence over her actions, which, though unseen and inaudible, was none the less effective in its results. "The question is," said Lord ELDON in Huguenin *v.* Baseley, 14 Ves. 300, "not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed round her, as against those who advised her, which from their situation and relation with respect to her they were bound to exert on her behalf."

While the contract of purchase made between the defendant Conway and the trustees under the instruments sought to be annulled was irrelevant to any material issue before the court, and would have been properly excluded from evidence, we are unable to see that its admission could in any way have been prejudicial to the rights of the appellants.

The judgment and order denying a new trial are affirmed.[1]

[1] Corporation of Latter Day Saints *v.* Watson, 1902, 25 Utah, 45.

In Allcard *v.* Skinner, 1887, L. R. 36 Ch. Div. 145, the facts appeared to be that the plaintiff, a young woman of twenty-seven, becoming interested in charitable work, was introduced, through the good offices of a Rev. Mr. Nihill, her confessor, to the defendant, the founder and lady superior of a Protestant sisterhood. After some considerable association with the members of the sisterhood in charitable work, the plaintiff was admitted as a member of the organization. On entering the society she made certain vows (framed by the Rev. Mr. Nihill), by which she promised to devote her property to the purposes of the sisterhood. In accordance with these she made a will, leaving all of her property to the defendant. She also made valuable gifts to the defendant, including large sums of money and certain railway stock. Some eight years later, becoming dissatisfied, she left the order, and a few days later joined the Roman Catholic Church. She then brought suit to recover certain of the gifts made to the defendant. In the course of his opinion, LINDLEY, L. J., said:

"There is no statutory law in this country prohibiting such gifts unless what is given is land or money to be laid out in land. These are provided for by the Mortmain and Charitable Uses Acts. But they have no application to this case. The common law, as distinguished from equity, does not invalidate such gifts as these. There being no duress or fraud, the only ground for impeaching such gifts at law would be want of capacity on the part of the donor; and although the plaintiff was a religious enthusiast, no one could treat her as in point of law *non compos mentis*. There is no authority whatever for saying that her gifts were invalid at law. It is to the doctrines of equity, then, that recourse must be had to invalidate such gifts if they are to be invalidated. The doctrine relied upon by the appellant is the doctrine of undue influence expounded and enforced in Huguenin *v.* Baseley, 14 Ves. 273, and other cases of that class. These cases may be subdivided into two groups, which, however, often overlap.

"First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor. Norton *v.* Relly, 2 Eden, 286; Nottridge *v.* Prince, 2 Giff. 246; Lyon *v.* Home, Law Rep. 6 Eq. 655, and Whyte *v.* Meade, 2 Ir. Eq. Rep. 420, all belong to this group. In Whyte *v.* Meade a gift to a convent was set aside, but the gift was the result of coercion, clearly proved. The evidence does not bring this case within this group.

"The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to shew that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made.

PROOF *v.* HINES.

IN CHANCERY, BEFORE LORD CHANCELLOR TALBOT, 1735.

[*Cases Tempore Talbot* 111.]

The plaintiff being intitled, in right of his wife, to some part of the late Sir Thomas Coleby's estate, and being a very mean illiterate person, and in very poor circumstances, applied to the defendant, (a brazier by trade,) and his wife to assist him in making out his pedigree, and getting such proofs as were necessary to the making out his title to this estate; the defendant telling him, That such things could not be done without money; and he answering, That he had none, nor did not know where to raise any without the defendant's assistance, desired him to advance it, and he would repay him: The defendant accordingly laid out several sums; and the defendant's wife employed several persons to search registers, &c. for the plaintiff; pending the suit the defendant's wife often declared, That she thought herself and her husband intitled to a good gratuity for their trouble and assistance of the plaintiff; but was resolved not to trust to the plaintiff's generosity, but to bind him as fast as pen and ink could bind him. The plaintiff coming some time after to the defendant's wife, desired her to continue her and her husband's care for his affairs; she thereupon pressed him very much for the payment of what money had been laid out by them; whereupon he offered to give a bond for 1000l. payable to the defendant in a year, for what services they had already done, and for such care as they would hereafter take of his affairs; to which the defendant's wife replied, he might take what time he pleased for payment of the bond, but pressed him very hard for repayment of what had been laid out by her husband and her: the plaintiff gave her his bond for 1000l. for the use of the defendant her husband

Huguenin *v.* Baseley was a case of this kind. The defendant had not only acquired considerable spiritual influence over the plaintiff, but was intrusted by her with the management of her property. His duty to her was clear, and it was with reference to persons so situated that Lord ELDON used the language so often quoted and so much relied on in this case. He said, 14 Ves. 299: 'Take it that she (the plaintiff) intended to give it to him (the defendant); it is by no means out of the reach of the principle. The question is not whether she knew what she was doing, had done or proposed to do, but how the intention was produced; whether all that care and providence was placed around her as against those who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf.' This principle has been constantly recognized and acted upon in subsequent cases, but in all of them, as in Huguenin *v.* Baseley, 14 Ves. 273, itself, it was the duty of the donee to advise and take care of the donor. Where there is no such duty, the language of Lord ELDON ceases to be applicable."

after the recovery of some part of the estate by the plaintiff; this bond was put in suit, and now the plaintiff brought his bill to have it set aside as unduly and unconscionably obtained, by taking advantage of the distress he was then under.

It was in proof in the cause, that at the time he gave this bond he was in the meanest circumstances, being reduced so low as to live upon what broken scraps of meat he could get from taverns and such places.

LORD CHANCELLOR. I have been a good deal doubtful in this case: for, as on the one hand it is intirely reasonable to leave people at liberty to dispose of their property as they think fit; so on the other hand, it is reasonable to prevent any imposition in such disposal: and if here has been no imposition on the plaintiff, and that all his defence be his poverty, or the inconveniency it may be to him to pay this sum, that will not be a ground for relief. But as this case is circumstanced, the plaintiff's poverty is not to be omitted in the consideration of the transaction. His circumstances were as mean as can be imagined, and no certainty that he should be ever able to discharge any part of this bond; and yet he gives an obligation for 1000l. to be paid, at all events, within the year. A poor illiterate man, who applies to the defendant and his wife for aid in pursuing his claim: they answer, that registers could not be searched, nor other things done without money: he thereupon replies, that he has none, but desires the defendant to lay it down for him. The cause goes on, and pending this suit, the defendant's wife presses for the money laid out; whereupon the plaintiff declares, that for the services they have done, and he hoped they would continue, he would give a bond; upon which the wife replies, he might take what time he pleased for the payment of the bond; but at the same time again presses for repayment of the money laid out by her husband and her, and then the bond is given. So that here is a plain contract between them: and how can I consider it as a gratuity, or otherwise than as a contract? Now though a mere voluntary contract is not to be set aside purely and simply because it is voluntary; yet that differs widely from the present case; which was not intended as a bounty, but as an execution of an original contract for the services already done. Had an attorney, pending the suit, taken such a bond as this upon the same transaction, would not the court set it aside? or would it suffer it to stand any farther than as a security for what was justly and legally due? The rule, *That a mischief is rather to be suffered than a general inconvenience,* does not at all affect this case; for, it would be a much greater inconvenience to leave men under difficulties and distresses open to all the oppression that other people may please to make them undergo. This is the reason upon which the court relieves against bonds given by young heirs, (Walter *v.* Dalt, 1 Chanc. Cas. 276; Barny *v.* Beak, 2 Cha. Cas. 136; Barny *v.* Pitt, 2 Vern. 14; Nott *v.* Hill, 1 Vern. 167; Knott *v.* Johnson, 2 Vern. 27; Wiseman *v.* Beake, 2 Vern. 121; James *v.* Oades, 2 Vern. 402; Earl of Ardglasse *v.* Muschamp, 1 Vern. 237; Bill *v.* Price, 1 Vern. 467; Lamplugh *v.* Smith, 2 Vern. 77;

Curwen *v.* Milner, 3 P. Will. 292, in notes (c); Twisleton *v.* Griffith, 1 P. Wil. 310; Earl of Chesterfield *v.* Jansen, 1 Atk. 342, 351, and 2 Ves. 144, 155, S. C.; Barnardiston *v.* Lingood, 2 Atk. 133; Sir Will. Stanhope *v.* Cope, 2 Atk. 231; Gwyne *v.* Heaton, 1 Bro. Cha. Rep. 1; Heathcote *v.* Paignon, 2 Bro. Cha. Rep. 167, are cases in which this court has relieved against unconscionable bargains, and cancelled improvident contracts entered into by young heirs.) and marriage-brocage bonds; and will not suffer any advantage to be taken of the extravagance and want of judgment, in the one case, and of the strong bias to obtain what is desired in the other. The only difficulty that arose with me was, whether the defendant had any share himself in the transaction? and that where fraud is pretended it must be fully proved. Here indeed the husband was not present when the bond was executed; but still, I think, there is sufficient ground for relief: for, here the wife was party to all the transactions in searching registers, &c. The contract for the bond was for their joint service; and though she did not press for the bond, yet she pressed for what worked more strongly, *viz.*, the repayment of the money which she and her husband had lain out at the time that he was not worth a shilling, and in the midst of the pursuit of his cause: and when this comes to be coupled with that other saying of her's, *That she would not trust to his generosity, but bind him as fast as pen, ink and paper could bind him,* it makes it plain that it was obtained of the plaintiff when under force and necessity; the pressing for the repayment being almost as strong as if she had actually required the bond.

And so decreed the bond to stand as a security only for so much as had been actually laid out with interest; and left the defendant at liberty to bring his *quantum meruit* at law for what he deserved for his pain and trouble. Reg. Lib. 1734. fol. 289. 414 S. C.

NICHOLLS *v.* NICHOLLS.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1737.

[1 *Atkyns* 409.]

Though a man is arrested by due process at law, if a wrong use is made of it against the person under such arrest, by obliging him to execute a conveyance which was never under consideration before, this Court will construe it a duress, and relieve against a conveyance executed under such circumstances.

NEILSON *v.* McDONALD *et al.*

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1822.

[6 *Johnson's Chancery,* 201.]

The Chancellor [KENT]. Before I enter on the discussion of the merits of this case I must dispose of a preliminary question respecting the competency of the testimony of the defendants G. and L., who were examined as witnesses for their co-defendants, saving all just exceptions.[1]

In the examination of the merits the testimony of the two defendants does not appear materially to alter or affect the conclusions which follow necessarily from a review of the pleadings and proofs.

The sale complained of was very evidently held and conducted by concert among all the defendants, and the object of the combination was to enable the defendants McD. and E. to buy in the property of the plaintiff at an enormous sacrifice of it, in order to indemnify themselves for the hazard or the loss of their debts against an insolvent son of the plaintiff, or else to coerce the plaintiff by these means to assume those debts of his son. Either motive was unconscientious and one which the law will not recognize and sanction. The defendants disclaim any such combination, but the facts admitted and proved do, in my judgment, discredit their denial. The defendant McD., who was the chief author of the transaction, and the most deeply interested in the success of the plot, admits in his answer that "he did require payment in specie at the sale, with the view of making advantageous purchases of property at the sale, in the hope of thereby saving a portion of the large amount justly due him from the son of the plaintiff." The defendant G., who was bound to have exercised a sound discretion, according to his own judgment, in the time, mode, and terms of sale, admits that when the plaintiff asked for a postponement of the sale he replied "that he should follow the directions of McD., the plaintiff in the execution, and proceed to sell"; and "that before the sale commenced W. McD. informed him that he would require payment from him in specie, and that G. then declared that he should sell the property for ready pay in specie." The defendant L., who disclaims in his answer of having an interest in the execution under which the sale was made, and all concert and combination in the sale, admits that he purchased a number of articles, such as three pleasure sleighs, a riding chair, a wagon and harness, and a quantity of corn and hay, for very small prices, which he states, to the extent of $25; and that all the purchasers except McD. and him had been required to make payment in specie, and that upon the settlement between the plaintiff and McD. he consented to give up what he purchased;

[1] So much of the opinion as relates to this question has been omitted.

and yet he says there was no combination! So the defendant E. admits in his answer that he attended the sale, "in the hope of making advantageous purchases thereat, and of thereby saving his demand against the son of the plaintiff, or some portion thereof." It is in proof that the defendant E. came to the sale prepared with specie in his pocket; and he gave up his purchases after the plaintiff had assumed his son's debt to him; and yet he also denies all concert and combination!

The deputy sheriff, G., plainly lent himself to be the agent of McD. in this scene of oppression, and he is justly censurable for the abuse of his discretion as a public officer, and by an unwarrantable use of his process, for the purpose of giving effect to this unlawful combination. The case, under all its circumstances, strikes me as a grievous instance of the abuse of power, for the purpose of oppression and extortion.

To give a just view of the case it will only be necessary to state a few of the prominent facts.

The plaintiff was a man of large real and personal estate, to the amount of from ten to seventeen thousand dollars, according to different estimates. This fact was of public notoriety, and well known to the defendants. The forced sale and the refusal of delay, and the demand of specie, were unmitigated acts of severity for the sole purpose of extortion. The execution was for $480.83, and it was levied while the plaintiff was absent at New York, and the day of sale was fixed at the early day of the 22d of November, which was some weeks before the return day of the execution. The defendant G. told a witness (John Hunter) that his object was to seize and sell the property of the plaintiff as soon as the law would permit, and he showed the execution to the witness, and mentioned that the plaintiff was absent at New York, and that he was afraid he would be home before the sale, and get an order to stay it. This witness was a deputy sheriff, and said that the conversation took place on the day of levying the execution. The defendant G., whose deposition has been admitted, for the reasons already stated, admits he had a conversation with Hunter relative to the execution and his proceeding on it, and undertakes to give, "as near as he can recollect," the conversation. He admitted he told the witness that when the plaintiff directed him to close the execution immediately he always did it; and that, "according to the best of his recollection," he did not make the observation charged upon him. This defendant G. is not an unexceptionable witness, considering the charges against him which have been made in the bill and proved, and considering that he was testifying under the influence which his character as a defendant, and his hazard of responsibility for costs in that character, would naturally promote. I have no doubt he used substantially the language imputed to him, and which marked the design of the combination. So, also, on the evening of the day of the sale all the defendants, and principally McD. and G., were engaged in conversation on the events of the day, and they said, in effect, that they had brought matters to bear just

as they wished, and had bought in the out-door personal property of the plaintiff for about $200, and brought him to a compromise for the debt due from his son.

At the sale the defendant G. resisted all reasonable offers for delay, and he admits that before the sale the plaintiff requested a postponement, and he said he should follow the directions of McD. A son of the plaintiff (John Neilson, Jr.) says that before the sale commenced G. said he had come to make a forced sale of the property of the plaintiff, and that he must have the money immediately and in specie, and he resisted the offers of the plaintiff of giving any security for a delay of a few hours, or until the next day. The defendant G., in his answer, denies the fact of this previous conversation; yet his conduct and declarations, during the whole course of the day, were precisely of the same character. A neighbor of the plaintiff (John Walker), of property and credit, and known as such to the defendant McD., purchased for $61 some articles worth $140, and he offered to pay in current bills immediately, or in specie the next day, and both offers were rejected by the defendant G., at the instance of the defendant McD., and the same articles were immediately put up again and bid off by the defendant McD. for $30. The defendant McD. then told the witness he did not dispute his word or credit, but he had then got the business so fixed that it would not do to take any man's word, for he could then get his money, and he would have it. Another witness (Jacob Sanford) heard the plaintiff offer the defendant G., that if he would wait until the next day he would pay him in specie, and give him satisfactory security for the payment. Another witness (R. M. Livingston) remonstrated with the defendant G. against the proceedings at the sale, as oppressive and unjust, and contrary to his duty, and he repeated to the defendant G. the offers of the plaintiff to procure the money in one hour, or if specie was required to procure it as soon as possible from Waterford, and to give any security for the fulfillment of the offer. The defendants wholly disregarded the offer, and the defendant G. declared the determination not to stay the sale on any security or on any account, unless the execution was immediately paid in specie. In the evening, after the sale, either the defendant G., or McD., in the presence of the other, said, in the hearing of the witness (Walter Broughton), that the plaintiff wished to stop the sale to get an opportunity to procure the money, but that McD. had directed the sale to proceed, declaring "he must be a Turk that day."

Property to the value of $1,800 or $2,000 was sold for less than $300; and about three o'clock in the afternoon, when all the out-door property of the plaintiff had been swept off, and the defendant G., with his coadjutors, was about to proceed to sell the furniture within the house, the friends of the plaintiff, to save his family from distress and him from ruin, pressed him loudly to come to terms of accommodation. He did so, and the defendant McD. extorted a bond and mortgage from him

for $2,500, covering not only the amount of the execution, but nearly $2,000 for demands which the defendant McD. had against a son of the plaintiff.

A decisive proof of the concert with which the three defendants, McD., L., and E., acted at the sale, and of the unjust and oppressive design with which they were actuated, is derived from the fact that upon the settlement all those defendants readily surrendered up the property which they had purchased.

It is perfectly apparent that this settlement, and the giving of the bond and mortgage and note, was not a free and voluntary act of the plaintiff, but that he was coerced into it by the distress under which he labored, from the severe conduct of the officer, and the ruin that was overwhelming him. There was no time given for the parties to cool and reflect, nor for the mind of the plaintiff to be relieved from the terror of the proceeding. The settlement was made *dum fervet opus*, and to talk of a bond and mortgage being freely given, while the victim lay bleeding at the spoiler's feet, is absurd. Such abuse of process is not to be tolerated. It would bring disgrace upon the administration of justice. Nothing can be more injurious to public morals, or excite greater alarm in the minds of the people, than to suffer the process of law to be made the instrument of extortion. It cannot be doubted that this court ought to afford ample redress in such a case, and the relief sought is conformable to the established principles of equity, and within the undoubted and indispensable jurisdiction of the court.

In Proof *v.* Hines, Cases temp. Talbot 111, a bond was obtained, not purely voluntarily, but under necessity. Advantage was taken of the party's circumstances and distress, and the Chancellor ordered the bond to stand as a security only for what was truly due at the time. So, in Gould *v.* Okeden, 3 Bro. P. C. 560, a conveyance obtained by taking an unreasonable advantage of the party's distress, ignorance, and dependence, was ordered to stand as a security for what was *bona fide* due. The same doctrine was declared in Kendrick *v.* Hudson, 6 Bro. P. C. 614, and in Thornhill *v.* Evans, 2 Atk. 330. In the latter case Lord HARDWICKE set aside a deed obtained by fraud and imposition, and declared that where there was an act of extortion the court would decree the party to refund. The opinion of the Chancellor in Nicholls *v.* Nicholls, 1 Atk. 409, is much in point. He said that though a man be arrested by due process of law, yet if a wrong use be made of the arrest by obliging him to execute a conveyance which was never under consideration before, the court would construe it a duress, and relieve him.

The cases which have been mentioned are only familiar illustrations of the ordinary doctrine and practice of the court.

The conduct of the plaintiff in reference to other and prior transactions has nothing to do with this act, and forms no justification or excuse for it. The execution itself, which was so misapplied, was the result of a replevin suit mentioned in the proofs, and embraced all the

claims of the defendant McD. in relation to it. If the plaintiff was accountable to that defendant for the proceeds of the timber, of which so much has been said in the case, the defendant McD. had his remedy by suit, in the regular course of justice. It is altogether inadmissible to receive any counter-claim or demand, by way of set-off, against the right of the plaintiff, resting in tort, and founded on the illegal combination, the abuse of process, and the oppression of which he has been made the victim. The plaintiff was not liable for the debts of his son, and the pretense that the plaintiff voluntarily undertook to discharge those debts with the anticipated portion of his son's share, in expectancy of the paternal estate, is a very lame pretext for the extortion, and is no alleviation of the proceeding. There is no rule of law founded on sounder principles of policy or more conducive to the safety of private right than that which forbids one tort or injury to be set off by way of compensation for another. It would be allowing parties to avenge with their own hands their own injuries, and would in its consequences recall the tumult and violence of the barbarous ages. In the case of spoliation under the Roman law no compensation was allowed to be opposed against the demand for restitution, according to the maxim of the civil and which is that of the common law: *Spoliatus ante omnia restituendus.* Pothier Trait. des Ob. s. 589; 2 Inst. 714.

It is admitted that the plaintiff has made a tender of the debt and costs due on the execution, and offered to deliver up the assignment of the judgment and the note to the defendant McD., and has demanded a return of his bond and mortgage.[1]

FULTON *v.* LOFTIS.

IN THE SUPREME COURT OF NORTH CAROLINA, 1869.

[63 *North Carolina* 393.]

Bill, set down for hearing upon pleadings and proofs, at Spring Term 1868 of the Court of Equity for BUNCOMBE, and by consent transferred to this Court.

The plaintiff alleged, that in 1859, he contracted to sell a tract of land to the defendant, at the price of $412.50, for which he took two notes of the defendant, payable in one and two years, and executed a bond to make title when the purchase money was paid, and that the

[1] The learned Chancellor therefore declared the sale oppressive and illegal: the bond and mortgage, as having been unduly and fraudulently obtained, were directed to stand only for the amount due on the execution, with interest and costs, and on payment of that amount, to be delivered up and cancelled.

defendant was put into possession; that afterwards, in 1865, the defendant, on the pretence of calculating the interest, induced the plaintiff to let him take the notes into his hands, whereupon he put them into his pocket, pulled out a pistol, and walked off, telling the plaintiff not to follow him. The bill admits a payment of $100 in Confederate notes, in 1863.

The prayer is for a decree rescinding the contract; an account of the rents and profits; and that the defendant be also decreed to give up possession.

PEARSON, C. J. The plaintiff has misconceived his remedy. When a contract is obtained by fraud or duress, a Court of Equity will entertain a bill for its rescission; but the plaintiff must allege that he was induced to enter into the contract, by reason of such fraud or duress. A bill for recission on the ground of fraud or duress perpetrated after the contract is made, is one of the first impression, and there is no principle upon which it can be maintained. The question is too plain to allow of discussion: Addington *v.* McDonnell, at this term.

The plaintiff having the legal title, may take possession, and thus force the defendant to file a bill for a specific performance, when the plaintiff may rely upon the alleged fraud, or duress, as a ground to induce the Court to refuse to entertain the bill; or the plaintiff may file a bill for specific performance, and ask for a reference as to the amount of the purchase-money remaining unpaid, and thus bring up the question, as to the manner in which the defendant obtained possession of the notes, and thus the controversy may be settled. But as we have seen, the idea of a decree for recission, for matters occurring six years after the contract was made, and after it had been in part performed, is out of the question.

Let the bill be dismissed, but without costs as to the defendant Loftis.

PER CURIAM. Bill dismissed.

RAU *v.* CATHERINE B. VON ZEDLITZ AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1882.

[132 *Massachusetts,* 164.]

ENDICOTT, J. This is a bill in equity, under the Gen. Sts. c. 113, § 2, cl. 11, brought against the Baron and Baroness Von Zedlitz and the trustee under her marriage settlement. The plaintiff alleges therein that the Baroness is indebted to him upon two drafts, accepted by her at Dresden, in Saxony, on the day previous to her marriage, which are now due and unpaid, and he seeks to obtain a decree that the trustee of the marriage

settlement shall apply to the payment of the drafts so much of the trust fund as is necessary.

The defense is that the acceptance of the drafts was forced upon the Baroness by threats and undue influence, and is therefore invalid and cannot be enforced in a court of equity, and that, under the provisions of the marriage settlement, the fund cannot be applied to the payment of these drafts.

As the case is presented to us, no question arises upon the second branch of the defense. The presiding judge heard the case on the evidence and dismissed the bill on the ground that the acceptance of the drafts was obtained by threats and undue influence; from his decision the plaintiff appeals, and the evidence upon which the finding is based is reported.

Upon a careful examination of the evidence, we cannot say that the decision upon the question of undue influence is erroneous. The record is voluminous, but the principal and material facts are as follows: The Baroness Von Zedlitz, whose maiden name was Kelsey, and who was a native of this commonwealth, was married on April 12, 1877. While traveling in Europe she became engaged, in December, 1876, to the Baron Von Zedlitz. She possessed considerable property in her own right, and a marriage settlement was prepared here at her request and sent to Dresden the following April. It was executed by her and her intended husband on April 10, two days before her marriage. The Baron Von Zedlitz was at that time largely indebted to the plaintiff, and there was evidence that some of the money was advanced to the Baron upon the promise by him to repay the plaintiff on his marriage with Miss Kelsey, whom he represented to be possessed of a large fortune. On April 9 the plaintiff went to Dresden for the purpose of obtaining from Miss Kelsey payment of his debt. Being informed of the marriage settlement, he endeavored without success to persuade the Baron to prevent its execution. On the following day, which was April 11, Miss Kelsey was induced to go to the office of a notary public to make some arrangement about a sum of money which the Baron's mother, Mrs. Von Winning, informed her the Baron owed to the plaintiff. She went, accompanied by the Baron and his mother, about five o'clock in the afternoon, and found there the notary, the plaintiff, another creditor of the Baron by the name of Muller, and Mr. Von Winning. An interpreter was also present during the interview, which continued till eight o'clock. And the evidence reported relates chiefly to what then took place.

She was told that the Baron was indebted to the plaintiff in the sum of 15,000 marks, and she was requested to sign the drafts to that amount, copies of which are annexed to the bill. It appears in the evidence that she refused, saying that it was impossible; that she had no money, and that she had parted with all her property. She was solicited again and again to sign the drafts and was told by Mrs. Von Winning that,

if she did not, disagreeable consequences would follow; that, unless the drafts were signed, the marriage on the following day would not take place; that the police would prevent their leaving their dwelling or would stop them at the door of the church, and that the whole affair would be published in the newspapers. It also appears from the testimony of the plaintiff that he intended to have the Baron arrested unless Miss Kelsey paid the debt. She desired to leave the room, and was told that she could not go until the matter was arranged. Upon the suggestion being made that Mr. Lehman, a lawyer who had been employed in connection with the settlement, might be sent for, it was opposed by the plaintiff.

The plaintiff could not speak English, and Miss Kelsey could not speak German, and Mrs. Von Winning, who spoke English, appears to have been the medium of communication between them, and was passing from one to the other during the interview. There was evidence that a portion of the money lent by the plaintiff to the Baron had been received by her, and it is evident that she was very desirous that Miss Kelsey should sign the drafts; and the presiding judge might well find, upon the evidence reported, that she was acting in behalf of the plaintiff, or in collusion with him, in persuading Miss Kelsey to sign, before the magistrate, the acceptances and other documents, among them a protocol, so called.

During this time Miss Kelsey was very much excited, and at the last of it was in tears, and there was evidence that she fainted. She stated in her testimony: "I think for a moment or two I must have lost consciousness, for the first thing I knew the Baron was holding me at an open window and somebody gave me a glass of water"; and again, "I was so worn out and tired and overcome that just as soon as I recovered consciousness, which I lost, Mrs. Von Winning came up to me and said, 'Now you had better sign,' and I thought at that time that I would do almost anything she asked me, and so I consented." She then signed the acknowledgment of the indebtedness of the Baron and the agreement that she would assume and pay it, and also signed the drafts. This was near eight o'clock. While in the room she paid some money to Rau and also to Muller, and there was a violent altercation between the Baron and Muller, during which the Baron seized Muller and shook him. It appears that Miss Kelsey was of a nervous and excitable temperament, and not familiar with business or the care of property.

There was conflicting evidence in regard to what took place before the notary. But we are of opinion that the presiding judge, before whom the case was heard, and who saw the principal witnesses, namely, the plaintiff and the Baron and Baroness, might well find that the acceptance of the drafts was forced upon Miss Kelsey by threats and undue influence. The contract she entered into was without consideration, and it was purely a question of fact whether she was induced to sign it

by threats and undue persuasions, and through fear that her marriage would be prevented. This in equity will constitute a good defense to the bill. Upon an appeal from a decree of a single justice, on a question of fact, the evidence being reported, the full court will not reverse the decision, unless it appears clearly to be erroneous. Reed *v.* Reed, 114 Mass. 372; Montgomery *v.* Pickering, 116 Mass. 227. See also Singer Manuf. Co. *v.* Long, 18 Ch. D. 395, 427.

A young woman, upon the eve of her marriage and in a strange country, requested and urged to assume and pay the debts of her intended husband, being led to believe if she does not comply with the solicitations pressed upon her that her marriage may be prevented, her intended husband arrested, and the whole affair published in the newspapers, certainly is the object of undue and improper influence, and in yielding to it at last, after long resistance, and without independent advice, cannot be said to be acting as a free and voluntary agent, for the circumstances preclude the exercise of free and deliberate judgment. The contract which she assumed was utterly without consideration; and it was said by Lord WESTBURY, in Williams *v.* Bayley, L. H., 1 R. L. 200, 218, "A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing and leaving his son in that perilous condition or taking on himself the amount of that civil obligation." In that case the threat was to prosecute the son for forgery.

The case of Kempson *v.* Ashbee, L. R., 10 Ch. 15, resembles the case at bar. The plaintiff, a young lady living with her step-father, at his solicitation, soon after she was of age became surety on his bond to pay a debt, payable to the defendant at the end of six years. The defendant, on the maturity of the bond, brought an action and recovered judgment against the step-father, and the plaintiff, who still lived with her step-father, was induced by him to execute a second bond as surety to pay the judgment and costs. Both bonds were prepared by the step-father's solicitor, and without independent advice. The defendant brought an action against the plaintiff on the bonds. On a bill brought by her both bonds were set aside as against her, and it was held that the second bond was connected with the first, and that, as there was no proof that she was aware of the invalidity of the first bond, the second was no confirmation. Dent *v.* Bennett, 4 M. & C. 269; Lyon *v.* Home, L. R. 6 Eq. 655; Eadie *v.* Slimmon, 26 N. Y. 9; Baldwin *v.* Parker, 99 Mass. 79; Central Bank *v.* Copeland, 18 Md. 305.

The plaintiff contends that by her subsequent acts she confirmed the transaction. While living in Germany after her marriage, the plaintiff pressed for payment and threatened legal proceedings, and she paid to

him money on account of the drafts, and wrote letters to her trustee, requesting him to send her money for that purpose. But to constitute a confirmation the acts must have been done with that intention by one who was not under the influence of the previous transaction (Montgomery *v.* Pickering, 116 Mass. 227, and cases cited), and with a knowledge of its invalidity (Kempson *v.* Ashbee, *ubi supra*). She was ignorant of her rights at that time, and supposed she was compelled to pay by reason of the obligations she had entered into.

It is also contended by the plaintiff that his forbearance to sue is a sufficient consideration for her acceptance of the drafts. But this principle of law has no application here. His forbearance to sue cannot prevent her from avoiding the contract on the ground that he exercised fraud or undue influence in obtaining it. If it were so, a party fraudulently or unduly persuaded to be responsible for the debt of another could never, after ascertaining his rights, rescind the contract, if the party guilty of the fraud or undue influence forbore to sue the principal. A party thus guilty cannot make an illegal contract binding by any act of conduct of his. If he had forborne to sue, or anything had intervened to his injury, after the party defrauded had ascertained the fraud, a different case would be presented. But of this there is no evidence in this case.

In this connection the plaintiff further contends that his forbearance to sue is not all; that "Miss Kelsey herself received direct and lasting benefits, a husband and a title, considerations to be enjoyed forever, and which to her were beyond the possibility of any pecuniary measurement." In support of this position the language of Mr. Justice WILDE, in Walker *v.* Sherman, 11 Met. 170, 172, is quoted, that "The slightest damage to the plaintiff or benefit to the defendant is a sufficient consideration to support his promise." But the concluding portion of the sentence, namely, "there being no fraud practiced upon him in obtaining his acceptance of the order," would seem to cover the case at bar. The inference from the plaintiff's argument is that he would have prevented the marriage unless she had signed the acceptance, or, as stated by the counsel for the defendants, "the argument for the plaintiff is, in effect, that she cannot rescind because she is married, and the plaintiff can no longer prevent her marriage." It is sufficient to say that the fact of her marriage cannot furnish a legal consideration for her acceptance of the drafts, if she was fraudulently or unduly influenced to accept the same.

We have no doubt that where a contract is sought to be enforced in equity, undue influence may be set up by answer as a defense, though a cross-bill would be necessary if the defendant seeks relief by the delivery up or the cancellation of the contract. It was therefore open to the defendant to set up the undue influence by answer, and, so far as this case is concerned, it was not necessary to file a cross-bill, as she does not seek the delivery or the cancellation of the drafts. Andrews *v.*

Gilman, 122 Mass. 471; Richards *v.* Todd, 127 Mass. 167; 2 Dan. Ch. Pract. 4th. ed., 1550.

It is conceded that in the absence of any evidence of the law of Saxony, the question of duress or undue influence is to be determined by the law of this commonwealth. But it is argued that although this is a bill in equity, yet the rule at law is to be followed in determining the validity of the debt, and the question is whether there was duress at law, and not whether there was undue influence according to the rule in equity; although the liability of the trust fund to satisfy such debt is to be determined as in equity. The plaintiff says he was forced into equity because the property has been placed in trust, and therefore the defendant cannot rely on an equitable defense. But the plaintiff was not forced into equity to prove his debt; he could have established his debt at law, and then have sought in equity to charge the trust fund with its payment. Having come into a court of equity voluntarily, with his whole case, asking to be allowed to prove his debt and thereby obtain equitable relief, the defenses in equity to his demand are open to the defendant. Whenever a plaintiff seeks to enforce a contract in equity, an equitable defense may be set up, though the remedy may not be so complete as by cross-bill seeking to set the contract aside. If the plaintiff had sued the drafts, an injunction might have issued in equity to restrain the further prosecution of his suit, and equitable relief could have been obtained and the drafts set aside, so far as the female defendant is concerned, as in Kempson *v.* Ashbee, *ubi supra.*

Nor do the rules applicable to creditors' bills govern this case. Under such a bill strictly so called an injunction may issue against all other creditors from suing at law or prosecuting suits, except under the direction of the court where the bill is pending. Creditors being thus forced into a court of equity, it is said that the legal rights of every creditor and the validity of his debt must be determined in equity upon the same principles as it would be at law. 1 Story Eq. Jur. § 549. In Whittaker *v.* Wright, 2 Hare 310, it was remarked by Vice-Chancellor WIGRAM: "But nothing would be more unjust than that the court should restrain the creditor from proceeding to enforce his rights at law, except upon the principle of allowing him to bring his legal rights with him into the office of the court, which it substitutes for the proceedings at law." Whether in such a case this defense of threats and undue influence could be set up we need not inquire. This is not a creditors' bill brought in behalf of all the creditors. It may be brought by a single creditor, and the other creditors cannot be compelled to come in, and have no right to come in and share with the plaintiff the benefit obtained by the suit. It is in the nature of an equitable trustee process, as distinguished from a creditors' bill. Phœnix Ins. Co. *v.* Abbott, 127 Mass. 558; Chapman *v.* Banker & Tradesman Publishing Co., 128 Mass. 478.

Decree affirmed with costs.

BRYANT *v.* PECK AND WHIPPLE COMPANY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1891.

[154 *Massachusetts,* 460.]

HOLMES, J. According to the allegations of the bill, the plaintiff became a party to a note from which he prays to be relieved, and transferred his stock, in consideration that the defendant would not prosecute his son for perjury, and under a threat from it that otherwise his son would be prosecuted. The transaction was illegal; Pub. Sts. c. 205, § 27; Gorham *v.* Keyes, 137 Mass. 583; and if the parties stood on an equal footing, neither of them would have a remedy against the other. Atwood *v.* Fisk, 101 Mass. 363. But it is well recognized that, although both parties are chargeable with knowledge that their agreement is contrary to some rule of law, yet if one of them acts under duress, or what the law regards as undue influence on the part of the other, they do not stand on an equal footing, and the weaker one may be granted affirmative relief. Worcester *v.* Eaton, 11 Mass. 368, 376; Belding *v.* Smythe, 138 Mass. 530, 533. It is settled that such threats as are alleged to have been addressed to the plaintiff constitute duress. Harris *v.* Carmody, 131 Mass. 51. See Rau *v.* Von Zedlitz, 132 Mass. 164. And accordingly it has been decided in other jurisdictions, in cases like the present, that the plaintiff was entitled to relief in equity. Foley *v.* Greene, 14 R. I. 618; Schoener *v.* Lissauer, 107 N. Y. 111; Williams *v.* Bayley, L. R. 1 H. L. 200; Davies *v.* London & Provincial Ins. Co., 8 Ch. D. 469, 477. See Sharon *v.* Gager, 46 Conn. 189; Rau *v.* Von Zedlitz, 132 Mass. 164, 167-169.

In Atwood *v.* Fisk, *ubi supra,* cited as establishing a different conclusion, it seems to have been found or assumed that the plaintiffs had not been subject to any undue pressure, as the decision states that there was "no such inequality in position, or abuse of advantages, as to entitle them to the aid of the court on the ground of public policy."

Demurrer overruled.

DOLLIVER *v.* DOLLIVER.

IN THE SUPREME COURT OF CALIFORNIA, 1892.

[94 *California,* 642.]

HARRISON, J.—Action for the rescission of a contract. The court below rendered judgment in favor of the plaintiff, and the defendant has appealed from the judgment, bringing the case here upon the judgment roll alone.

The court finds that the parties are husband and wife, having been

married in 1873, and that the plaintiff, at the time of their marriage, was the owner of certain real estate as her separate property, at that time of the value of one hundred and twenty-five thousand dollars, and that after her marriage with the defendant she acquired certain other property, which was also her separate estate. On the 27th of August, 1885, the defendant abandoned the plaintiff, and thereafter ceased to live with her, and on the evening of that day, after leaving her, he caused her to be served at her residence with a summons and copy of a complaint in a suit for divorce, brought by him against her. The court finds that at that time, and for some time previously, the plaintiff was a sufferer from general nervous prostration, and that the abandonment by the defendant, and the nature of the charges in the complaint for divorce, caused her great agitation and distress of mind, and greatly aggravated her bodily infirmity; and that while so distressed in mind and sick in body, she almost immediately sought out the defendant and urged him to dismiss the suit and return to her; and that on the 31st of August they met by appointment at the office of Mr. A. N. Drown, who was his attorney, and to whom he introduced the plaintiff, with the statement that they had come to make a settlement. At that interview certain memoranda of the settlement were prepared by Mr. Drown in the presence of both parties, and signed by them, and on the next day formal instruments of settlement, which in the mean time had been prepared by his attorney, were executed by them.

By these instruments, the plaintiff made to the defendant her promissory notes, amounting to thirty thousand dollars, and secured their payment by a mortgage upon certain of her real estate, and a memorandum of agreement was signed by both parties, reciting that "all of the property belonging to both of said parties has hitherto been and is now held by Mary W. Dolliver," and that "differences have arisen between said parties relating to such property, and the respective rights of each concerning the same," and that "in mutual consideration of the premises," it was agreed by them that the property that day conveyed by him to her should be her separate property, and that the property transferred by her to him, together with the aforesaid promissory notes and mortgage, should be his separate property. It is for the rescission of these agreements, and the restitution of the plaintiff to the property so conveyed, and the surrender of the notes and mortgage, that this action was brought.

The court finds that the above recitals in the memorandum of agreement had no foundation in fact; that no property of the defendant had been held by the plaintiff, and that he had no property; that there had been, in point of fact, no differences in the sense assumed in the memorandum; that the claim set up by the defendant, and which the settlement purported to adjust, was not a *bona fide* claim on his part, and that the memorandum purported to give to the plaintiff nothing which was not in point of law and fact already hers, and effected nothing for her pecuniary

advantage. The court also finds that the abandonment of the plaintiff "was without just cause, was made in bad faith, and the suit instituted by him, ostensibly to obtain a divorce, was brought by him merely to harass and vex the plaintiff, and as a means of coercing her into a surrender to him of a portion of her separate estate, and for no other purpose"; that the matters set forth in his complaint as substantive grounds for divorce were untrue in point of fact, and known by the defendant at the time to be untrue, and that the allegations inserted therein as to the amounts of money which had been turned over by him to his wife were not true in point of fact, and that those amounts were grossly and purposely exaggerated for the purpose of alarming her, and influencing her to make a settlement; that the plaintiff executed the instruments in manner and form as they had been prepared by the attorney for the defendant; that she had no independent advice concerning them or their legal effect and operation, and did not in fact comprehend their effect in point of law upon her property rights; that she was constrained to their execution by considerations of the immunity she hoped to obtain from the personal disgrace apprehended by her from the trial of the suit for divorce upon the charges made against her in the complaint, and that it was under the moral pressure exerted upon her by these various considerations that she acted in executing the said instruments.

An action for the rescission of a contract may be maintained whenever the consent of the party seeking to rescind was obtained through any fraud or undue influence of the other party. Civ. Code, sec. 1689. "Undue influence" is defined in the Civil Code, sec. 1575, to consist,— "1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; 2. In taking an unfair advantage of another's weakness of mind; or 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress."[1]

The plaintiff and defendant were husband and wife, and by virtue of that relation a personal trust and confidence had been created between them, which imposed upon the defendant the obligation of exercising the highest good faith towards the plaintiff in any dealings between them, and precluded him from obtaining any advantage over her by means of any misrepresentation, concealment, or adverse pressure. Civ. Code, sec. 2228. This relation and the obligation arising from it were not destroyed by the mere fact that an action for divorce was pending between them. They were still husband and wife, and so long as that relation existed between them, the law would not permit any inquiry into the extent of the trust and confidence which is presumed to be placed by one in the other; nor can the husband, by bringing an action for divorce against his wife, divest himself of the obligations which are imposed upon him by virtue of such relation.

The suit for divorce was brought by the husband on the 27th of August, under such circumstances as naturally to surprise and distress the wife. They had been living together for many years as husband and wife, and in the exercise and enjoyment of the confidential relations incident thereto. On that day he dined at home with her and the family, together with an invited guest, and immediately after dinner announced to her his intention of abandoning her, and on the same evening caused her to be served with the summons and complaint in the suit for divorce. Instead of resisting the suit, or assenting to its prosecution, she almost immediately sought him out and urged him to dismiss the action and return to her. Although he at that time refused to do this, the parties, within four days after the commencement of the action, met by appointment at the office of his attorney to make a "settlement." Instead of insisting that the plaintiff should have the benefit of some independent and disinterested advice, he refrained from calling in any adviser for her, but took upon himself the duty of formulating the instruments by which the "settlement" was to be effected, and had himself the benefit of the presence and advice of his own attorney. The intervention of Mr. Drown in the preparation of the instruments cannot be considered as any protection to the plaintiff. He was the attorney of the defendant, had instituted the suit in his behalf, and was under his professional obligation to protect the interests of his client, and would feel under no obligation to protect the interest of the plaintiff, or to give to her any advice or counsel in reference thereto. The court finds: "In the progress of the settlement, particularly on August 31st, when its precise terms were being formulated, the defendant here had the benefit of the presence and advice of his attorney, Mr. Drown, who in fact instructed him as to the advisability in his interest of a certain important detail of the settlement; the plaintiff here, the wife, in point of fact, upon her part, had no advice or assistance of any character in adjusting the terms, nor in the conduct of the negotiations which culminated in the settlement in question."

Under these circumstances, the husband must be held to have been bound to the exercise of all those duties towards the wife which spring from the existence of the relation between them, and to be subject to that familiar rule in equity, "that he who bargains in matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence," and thus be precluded from gaining any advantage from the transaction between them. When, therefore, the court found that the transaction was without any pecuniary advantage to the wife; that the husband had received great pecuniary advantage therefrom; that the consideration recited in the instrument of settlement, and upon which it purported to have been made, was untrue; that the suit for divorce had been brought by him as a means of coercing her into a surrender of a portion of her separate estate, and for no other purpose; that it had the effect to aggravate her

bodily infirmity; and that she was constrained to execute the instruments of settlement by reason of the moral pressure exerted upon her by the consideration of the effect upon her that would be produced by the prosecution of the suit; and that she had no independent advice concerning the legal effect and operation of said instruments,—its conclusion of law and judgment that the defendant should surrender to the plaintiff all the fruits of said settlement, and that the settlement should be in all respects rescinded, was the necessary result of such findings, and must be affirmed.

3. The objection by the appellant to that portion of the judgment requiring the transfer of the Hyde Street lot is without merit. The court finds that after the execution by the plaintiff to the defendant of her promissory notes aforesaid, he hypothecated them to the Security Savings Bank for a loan of nine thousand dollars, and that he applied six thousand five hundred dollars of the money so received by him to the purchase of the Hyde Street lot, giving at the same time a mortgage to the vendor for the sum of six thousand dollars to secure the unpaid portion of the purchase price thereof. The plaintiff had the right, as against the appellant, to an absolute surrender and concellation of these notes; but inasmuch as the Security Savings Bank was a *bona fide* holder of a lien thereon to the extent of nine thousand dollars, she had the right, at her option, to follow the proceeds of the notes into the property into which they had been converted. The defendant thereby suffers no injury, as he merely surrenders to the plaintiff the property which he obtained by the unauthorized use of her promissory notes, and the plaintiff can become the owner of the property only by the payment of the unpaid portion of the purchase price for which the property is held in mortgage. For the purpose of sustaining the judgment of the court, we can assume that the defendant was unable or unwilling to redeem the notes from the bank, or that the plaintiff elected to take the property into which the money for whose payment they were held had been converted, and in the absence of any evidence upon the point, we must also assume that the purchase price of the property was its actual value. The proposition on the part of the appellant that he may be liable to a suit for the unpaid amount of the purchase price is sufficiently answered by the fact that it does not appear from the record that he gave any personal obligation therefore. If the defendant had desired to retain this property as his own, it was at least incumbent on him to offer to return to the plaintiff her promissory notes, freed from the claim of the bank. She was under no obligation to accept in lieu thereof the obligation of the defendant to return them when this lien should be discharged, or to accept the encumbrance on the property as their equivalent.

4. The provision in the judgment in reference to the lots in the Paul tract is not prejudicial to the defendant. The terms of the judgment are, that he shall execute to her "a good and sufficient deed of all the interest acquired, or claimed to have been acquired, . . . by virtue of any in-

strument executed by the plaintiff to said defendant on the thirty-first day of August, 1885, or one the first day of September, 1885." The complete terms of the "settlement" between the plaintiff and defendant are not found by the court, and the allegation of the plaintiff that she signed other instruments than those set forth in the complaint is not denied. If the defendant did not acquire any interest in the Paul tract lots by virtue of any instrument executed on either of those days, he can suffer no injury by a compliance with the judgment. And as the injury to the plaintiff is found by the court to have resulted solely and directly from the wrongful acts of the defendant, it is not for him to complain that the court has required of him as complete restitution as is within his power to make, so long as he sustains no injury or diminution of his estate.[1]

The judgment is affirmed.

SECTION 4. NOTICE.[2]

BASSET *v.* NOSWORTHY.

IN CHANCERY, before LORD KEEPER NOTTINGHAM, 1673.

[*Reports Tempore Finch,* 102.]

The Plaintiff, Sir William Basset, intitled himself, as Son and Heir of Elizabeth Seymour, who was the only Daughter and Heir of Sir Joseph Killegrew, who was Brother and Heir of Sir Henry Killigrew, whose Estate the Lands in the Bill mentioned formerly were; the Defendant's Title being under a pretended Purchase (as the Plaintiff alledged) of these Lands at Drury-house, and under the Will of Sir Henry Killigrew, the Purchase being from Jane Davis, afterwards the Wife of Mr. Berkley, and from Henry Hill, the pretended natural Son of the said Sir Henry Killigrew, of which Will the Plaintiff alledged there was a Revocation by some subsequent Deed or Will; and for a Discovery thereof, and what Mr. Nosworthy really paid for the Purchase, and what Deeds and Writings he had, and to set aside the Incumbrances which he had bought to protect his Purchase, and that Mrs. Seymour might try

[1] The opinion of the Court on a question of practice is omitted.

[2] On the subject of the protection to property accorded to innocent purchasers for value without notice, see an article by Professor James Barr Ames in 1 Harv. Law Rev. 1; Langdell's Summary of Equity Pleading, 209-227. For a collection of cases see Ames' Trusts, 286-289.

her Title at Law upon the supposed Revocation against the Title of the Defendant, as a purchaser under the said Will, the now Plaintiffs exhibited this Bill:

To which the Defendant pleaded a Dismission of a Bill in the Court of Exchequer signed and inrolled, which Bill was there brought for the same Matter as in this Bill, and fully examined and dismissed upon a full Hearing, but without Prejudice, and the Dismission duly signed and inrolled; and he farther pleaded, that he was a Purchaser for a valuable Consideration, *bona fide,* paid without Notice of any Revocation.[1]

The Cause being then set right before the Court upon the true Merits thereof, there were only two Points which were considerable:

1. What the Law of this Court is concerning Purchasers.

2. Whether the Defendant was a Purchaser within that Law.

As to the first Point, the Purchaser, *bona fide,* without Notice of any Defect in his Title at the Time of the Purchase made, may lawfully buy in a Statute or Mortgage, or any other Incumbrance; and if he can defend himself at Law by any such Incumbrances bought in his Adversary shall never be aided in a Court of Equity by setting aside such Incumbrances; for Equity will not disarm a Purchaser, but assist him; and Precedents of this Nature are very antient and numerous, *viz.*, where the Court hath refused to give any assistance against a Purchaser either to an Heir, or to a Widow, or to the Fatherless, or to Creditors, or even to one Purchaser against another.

1. And this Rule, in a Court of Equity, is agreeable to the Wisdom of the Common Law, where the Maxims which refer to Descents, Discontinuances, Nonclaims, and to collateral Warranties, are only the wise Arts and Intentions of the Law to protect the Possession, and to strengthen the Rights of Purchasers.

2. As to the second Point the Court declared, that the Defendant had sufficiently proved his Plea, and himself to be a Purchaser within the Protection of this Court, because no Fraud or Circumvention appeared; and it was evident, that the Defendant had paid several great Sums to discharge Statutes, which incumbered those Lands, over and above what was paid to Mrs. Jane Berkley for her Estate for Life, and to Henry Hill for his Reversion; and tho' the Lands were proved to be of much greater Value at this Time, by the falling of several Lives, than what they were at the Time of the Purchase, yet that will not alter the Case in Equity, because in Purchases the Question is not, whether the *Consideration be adequate, but whether 'tis valuable;* for if it be such a Consideration as will make the Defendant a Purchaser within the Statute 21 Eliz. and bring him within the Protection of that Law, he ought not to be impeached in Equity.

And since Henry Hill had nothing to subsist on during his Minority but this Reversion, and being a Bastard could have no Kindred by the Law, and probably but few Friends, there was some Hazard of the Money,

[1] Part of the case dealing with pleading and practice is omitted.

which was advanced during his Minority, if he died before the Fine and Recovery suffered.

Therefore the Court allowed the Plea and dismissed the Bill, and suppressed all the Depositions taken in this Cause before April last, and all since, but only such which relate to this Plea of the Defendant.

HARRISON *v.* FORTH.

IN CHANCERY, BEFORE LORD KEEPER SOMERS,[1] 1695.

[*Precedents in Chancery* 51.]

The Master of the Rolls was of opinion in this case, that if A. purchases an estate, with notice of an incumbrance, or that it is redeemable, and then sells it to B. who has no notice; who afterwards sells it to C. who had notice; that by this, the first notice to A. the first purchaser, is thereby revived, and that C. the last purchaser shall be liable to the incumbrance or redemption, as if it had never been in the hands of one who had no notice.

Afterwards, on appeal to my Lord Keeper, it being urged, that in such case an innocent purchaser without notice may be forced to keep his estate, and cannot sell it, and shall be accountable for all the profits received *ab initio*, his Lordship held, that though A. and C. had notice, yet if B. had no notice, the plaintiff could not be relieved against the defendant C. and ordered C. to be examined on interrogatories, if he ever saw the conveyance from the plaintiff to her sisters, and then to be tried if the defendant C. paid any, and what consideration for the said lands; and if B. had notice at the time of his purchase that it was redeemable; for if he had not, the plaintiff could not be relieved, though A. and C. had notice.

[1] "Learning, patience, industry, instinctive equitableness of judgment, comprehensiveness of view, subtlety of discernment, and command of apt and perspicuous language; in short, all the qualities best fitted to adorn the woolsack are ascribed to Somers by his contemporaries. Yet, partly by fault of his reporters, partly in consequence of the dearth of *causes célèbres*, partly by reason of his early surrender of the great seal, his recorded achievement is by no means commensurate with his reputation. Of his decrees in chancery only the meagre summaries given by Vernon and Peere Williams are extant." Article on John, Lord Somers, in Dict. Natl. Biography.

BRANDLYN *v.* ORD.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1738.

[1 *Atkyns* 571.]

It was said by Lord Chancellor in this cause, that a man who purchases for a valuable consideration, with notice of a voluntary settlement from a person who bought without notice, shall shelter himself under the first purchaser, yet it must be the very same interest in every respect.

He likewise said, he never knew a man defend himself in this court, as a purchaser for a valuable consideration under articles only; if he is injured, he must sue at law upon the covenants in the articles.[1]

LOWTHER *v.* CARLTON.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1741.

[2 *Atkyns* 242.]

This is a bill brought to impeach a purchase made 32 years ago: the defendant was a purchaser with notice, from the Marquis of Wharton, who bought without notice.

It is certainly the rule of this court, that a man who is a purchaser with notice himself from a person who bought without notice, may shelter himself under the first purchaser, or otherwise it would very much clog the sale of estates.

If a counsel or attorney is employed to look over a title, and by some other transaction foreign to the business in hand has notice, this shall not affect the purchaser; for if this was not the rule of the court it would be of dangerous consequence, as it would be an objection against the most able counsel, because of course they would be more likely than others of less eminence to have notice, as they are engaged in a great number of affairs of this kind.

[1] The balance of the case dealing with questions of practice is omitted.

STERRY *v.* ARDEN.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1814.

[1 *Johnson's Chancery* 261.]

Louisa Ann, one of the plaintiffs in this case, and one of the daughters of James Arden, and Robert Sterry, her husband, filed their bill to obtain the benefit of a conveyance made to the defendants, Richard D. Arden and DeWitt Clinton, in trust for her, by her father, James Arden, and for an account. The circumstances attending the execution and delivery of this deed are the same as those stated in the preceding case, in regard to the deed of the plaintiff's sister, Eliza B. Arden; and which it is, therefore, unnecessary to repeat.

The circumstances peculiar to this case, stated in the bill, were, that on the 11th of December, 1809, the plaintiffs married, and had a child born, which is still living. That the plaintiff, Robert Sterry, when the marriage took place, understood, and believed that Louisa Ann had a beneficial interest in the trust premises according to the conveyance. That James Arden fraudulently executed a deed of conveyance of the trust premises to the defendant, Philip Verplank, a relation, who, knowing the interest of the plaintiffs in the premises, fraudulently accepted such deed, and claimed to hold the premises by virtue thereof: they, James Arden and Philip Verplank, thereby intending to defraud the plaintiffs, and defeat the deed in trust for Louisa Ann, and the estate thereby created. That the pretended deed to Verplank was dated the 11th of December, 1809, and expressed to be in consideration of a large sum of money paid, by him, to James Arden; but that, in fact, the deed was not executed on that, but on some subsequent day, and fraudulently dated anterior to its actual delivery; and that, if, in fact, it was executed on the 11th of December, 1809, it was so executed and accepted, at an hour subsequent to, and with full knowledge of the marriage of the plaintiffs; and that the consideration, mentioned in the deed to Verplank, was never truly paid, or secured by him, to James Arden, from the proper funds of Verplank.

The Chancellor [KENT.] The opinion which I have already given in the other case [Souverbye *v.* Arden, 1 Johns. Ch. 240], would then apply to, and govern this, was it not for a new matter of defence set up by Verplank, who claims to be a subsequent *bona fide* purchaser. This necessarily leads me to the consideration of two very important points arising out of this case:

1. Whether the voluntary conveyance to the daughter was fraudulent and void, under the 3d section of the act of the 26th of February, 1787,

(s. 10. c. 44., and which is the same, precisely, as the statute of 27th *Eliz.* c. 4.,) as against a subsequent purchaser for valuable consideration; and, if so, then,

2. Whether the intervening marriage of the plaintiffs, between the settlement and the purchase, did not restore the first deed, and give it value and validity.

1. I shall consider Verplank as a purchaser for a valuable consideration. He gave 16,000 dollars in cash, and, though it may have been a very cheap purchase, there was not such inadequacy of price as to justify an inference of fraud. I shall, also, consider him as a purchaser without actual notice of the settlement upon the plaintiff. He declares in his answer, that he had no knowledge or notice of the conveyance of 1805, when he purchased, and there is not proof to contradict this answer. But I hold him chargeable with constructive notice, or notice in law, because he had information sufficient to put him upon inquiry. He admits that, before the execution of the deed, he had heard that the grantor had made some provision for his daughters out of property in Greenwich street; and there is no evidence in the case, that the grantor owned any other property in that street, except the lots included in the settlement. Here, then, is the case of a fair voluntary conveyance, made by a father to his daughter, he not appearing to be indebted at the time, and a subsequent sale made by him, with intent to defeat that settlement, but made for a valuable consideration, and to a purchaser chargeable only with notice in law. The question arising on this first point is definitely settled, in England, by determinations of a recent date in the four great courts at Westminster; and it is impossible not to feel all the respect which is justly due to decisions of so much weight and authority. Evelyn *v.* Templar, 2 Bro. 148; Doe, *ex dem.* Ottley *v.* Manning, 9 East, 59; Doe *v.* Martyn, 4 Bos. & Pull. 332; Hill *v.* The Bishop of Exeter, 2 Taunt. 82; Doe *v.* Hopkins, in the Excheq., cited in 9 East 70. The voluntary deed is considered fraudulent and void against the subsequent deed; and it is to be held immaterial whether the purchaser had, or had not, notice of the prior deed; and it was an old settled rule, decided in Gooch's case, (5 Co. 60.,) that notice to a purchaser, of a fraudulent deed, was of no consequence, as it was still void.

It has been suggested, that this is a principle settled in England since our revolution; but it appears to me that the late cases have declared no new doctrine, and have only followed the rule as they found it, long before settled by a series of judicial decisions of too much authority to be there shaken. In the late case in East's Rep. Lord ELLENBOROUGH, in delivering the opinion of the K. B., gave a full and accurate view of most of the cases on both sides of the question, from the time of the statute of Elizabeth; and no one who examines that opinion attentively, and, especially, if he also inspects the original cases referred to, can well hesitate as to the correctness of the conclusion drawn by the court, that "the weight, number, and uniformity of the

authorities, in favour of the rule as there decided, do very much preponderate."

It cannot be expected that I should attempt to go over in detail, the numerous cases which have been so ably arranged and reviewed, and so fairly stated in the opinion referred to. I shall content myself with merely alluding to them, and with the remark, that those cited in favour of the position, that the voluntary deed is only, *prima facia,* fraudulent as against the subsequent purchaser, are, generally, mere *dicta,* and not solemn adjudications upon the point.

In favour of the voluntary settlement, are Sir Ralph Bovey's case, 1 Vent. 193; Jenkins *v.* Kemeshe, Hard. 398; 1 Lev. 150; Lavender *v.* Blackstone, 2 Lev. 146; Garth *v.* Mois, 1 Keb. 486; Anon. Sty. 446; Gilbert's Law of Ev. 201; Standon *v.* Charlwood, MSS. cited 9 East, 64; Lord MANSFIELD, in Cadogan *v.* Kennett, Cowp. 434., and in Doe *v.* Routledge, Cowp. 708. 710.

In favour of the subsequent purchaser, are Woodie's case, cited in Colville *v.* Parker, Cro. Jac. 158; Prodgers *v.* Langham, 1 Sid. 133; White *v.* Hussey, Prec. in Ch. 14; Tonkins *v.* Ennis, 1 Eq. Cas. Abr. 334, pl. 6; White *v.* Sansom, 3 Atk. 412; Townsend *v.* Windham, 2 Ves. 10; Roe *v.* Milton, 2 Wils. 356; Goodright *v.* Moses, 2 Bl. Rep. 1019; Chapman *v.* Emery, Cowp. 278; Lord KENYON, in Nunn *v.* Wilsmore, 8 Term, 528. There are, however, some cases which are not mentioned in the opinion delivered by Lord ELLENBOROUGH, and which, as it seems to me, give additional weight to the opinion which has been adopted. Thus in Walker *v.* Burrows, 1 Atk. 93, Lord HARDWICKE observes, "It has been said, all voluntary settlements are void against creditors, equally the same as they are against subsequent purchasers, under the statute of 27 Eliz. ch. 4, but this will not hold;" and he afterwards adds, "But, upon the statute of the 27 Eliz., which relates to purchasers, there, indeed, a settlement is clearly void, if voluntary, that is, not for a valuable consideration, and the subsequent purchasers shall prevail to set aside such settlement." Again, in Upton *v.* Basset, which was shortly after the statute, (Cro. Eliz. 445.,) there was an evident admission and understanding of all the judges, that a voluntary conveyance was void, under the 27 Eliz., against a subsequent *bona fide* purchaser for valuable consideration. The case of Taylor *v.* Stile is cited by Sugden, p. 483., as being decided in chancery, in 1763, and in which Lord NORTHINGTON held it to be clear, that a subsequent purchaser for valuable consideration, though with notice, should set aside a voluntary settlement; and Mr. J. Bathurst said, he knew that Lord HARDWICKE had determined so in twenty instances. In Douglass *v.* Waad, 1 Ch. Cas. 99, the court of chancery set aside a voluntary conveyance as fraudulent against a subsequent purchaser, and though the court are reported to have said, "that all voluntary conveyances are, *prima facie,* to be looked upon as fraudulent against purchasers, unless the contrary be made to appear," yet the decree was conformable to the

principle contended for by the purchaser, for it set aside the voluntary conveyance as fraudulent, though nothing appeared but the want of valuable consideration to make it so. It is, also, worthy of notice, that, in the original text of the treatise of equity, published in 1737, and of which Fonblanque is the editor, (1 Fonb. 268.,) the same doctrine is explicitly laid down. In short, the principle set up in favour of the purchaser, has been so long and so well established, by a series of authoritative decisions, supported by the most eminent judges, that I feel bound by them, whatever doubts I might have had upon this construction of the statute, if I had been at liberty to follow my own reflections. When a principle has taken such deep root, and received such uniform support, it belongs to the legislature, and not to the courts of justice, to suppress or destroy it.

It has been observed that the present defendant was not a purchaser with actual notice of the deed of settlement. He does not, therefore, come within the exception for which some have contended. Doubts have been frequently expressed, whether the better construction of the statute would not have been to support the voluntary conveyance against purchasers for a valuable consideration, with notice; (and to that opinion I strongly incline;) yet it is pretty evident, that the allusion here was only to the case of actual notice, where the purchaser was intentionally and premeditatingly defeating the fair claims and expectations of the prior grantee. 9 East, 71; 4 Bos. & Pull. 335; 1 Fonb. 269. n. g. Equity does make a distinction between purchasers with and without notice of the prior voluntary settlement made without fraud; but it is only when the former comes for the aid of the court to compel a specific performance, and it then refuses its aid, and leaves him to his remedy at law. Bennet *v.* Musgrove, 2 Ves. 52; Oxley *v.* Lee, 1 Atk. 625.

2. The next point is, whether the marriage of the plaintiffs, before the purchase, did not give a new character to the first deed, so as to entitle it to preference.

It is admitted that the deed to Verplank was made and executed after the marriage, and in consequence of it, and the testimony in the case is decisive, (I refer to the depositions of Mrs. Servant and Colonel Hawkins,) that the plaintiff, Robert Sterry, married with previous knowledge of this deed of settlement on his wife. Under these circumstances, I consider the law to be, that the first deed became good and valuable, and ought to prevail. The marriage was a valuable consideration, which fixed the interest in the grantee against all the world; she is regarded from that time as a purchaser, and as much so as if she had then paid an adequate pecuniary consideration. It has been a principle of long standing, and uniformly recognised, that a deed, voluntary or fraudulent in its creation, and voidable by a purchaser, may become good by matter *ex post facto*. 1 Sid. 133. 1 East, 95. It is the constant language of the books, and of the courts, that a voluntary deed is made good by a subsequent marriage, and a marriage

has always been held to be the highest consideration in law. Co. Litt. 9 b. The cases do not require that the settlement should have been made with a view to any particular marriage; it is sufficient that the settlement was afterwards known to third persons, and was one probable inducement to the subsequent marriage. Indeed, in Brown *v.* Carter, 5 Ves. 877, 888, 889, Lord ALVANLEY did not think it very material to prove that the marriage was even made with notice of the voluntary settlement, as the knowledge of the circumstances of the party, and the inducement, were to be presumed. The principle is, as it is there stated, that it would be a fraud on the husband, if the probable inducement was to be afterwards withdrawn, and that it would be gross injustice to take away the benefit of the settlement from the married parties, and their issue. The case of Prodgers *v.* Langham, 1 Sid. 133, is a leading one on this point, and it has always been mentioned as good law. That was a case of a voluntary conveyance, in trust, for an only daughter for twenty-one years, to the intent that the profits, before marriage, should be applied to her maintenance, and, if she married with the father's consent, then in trust for her during the residue of the term. The court held, that the conveyance to the daughter was a voluntary conveyance, and would have been void as against the defendant, a subsequent purchaser for valuable consideration, if the marriage had not intervened, yet when that took effect, it ceased to be voluntary, and became supported by a valuable consideration, which was unimpeachable, inasmuch as the marriage was an advancement to the daughter, and the husband was induced (though that fact does not appear in the case) by the prospect of this provision. The case of Kirk *v.* Clark, Prec. in Ch. 275; 2 Eq. Cas. Abr. 45, pl. 13, is equally in point; it was there held, by Lord Ch. COWPER, that a voluntary settlement on a son, before any treaty of marriage, or the contemplation of any, became valuable upon his marriage, which was made with notice of it, the settlement being regarded as a principal inducement. A similar decision was made in the case of the East India Company *v.* Clavell, Prec. in Ch. 380, 381, and the proof here, brings this case precisely within the reach of those I have cited; for here was not only actual notice of the settlement, but inducement to marry in consequence of it.

The conclusion from these cases, and from the principles which they lay down, appears to me to be, that the marriage of the daughter, in this case, changed the character of the previous settlement, and placed her in the light of a purchaser for a valuable consideration, and gave her preference to any subsequent purchaser. I shall, therefore, set aside the deed to Verplank, and make the same decree as in the former case.

N. B. This decree was unanimously affirmed, on appeal to the court of errors, March 28th, 1815. [See 12 Johns. Rep. 536.]

WOOD *v.* MANN AND OTHERS.

IN THE UNITED STATES CIRCUIT COURT, 1833.

[1 *Sumner* 506.]

Bill in Equity to set aside a certain conveyance, made by the plaintiff to one John R. Adams, (a defendant,) asserted to have been procured by fraud and imposition upon the plaintiff. The bill averred, that Elisha Fuller, one of the defendants, had notice of the alleged fraud and imposition, in the following terms, namely: "That the said Fuller, *then and there well knowing all and singular the premises, and combining* and confederating as aforesaid, the nominal consideration of the said deed, being stated to be forty thousand dollars; but what consideration, or whether any consideration, was paid therefor by the said Fuller, your orator knows not; and the said Fuller, combining and confederating as aforesaid, *well knowing all the premises,*" &c. Fuller pleaded, that he was a *bona fide* purchaser under Mann of parcel of the premises, without notice of the asserted fraud or imposition; that he had paid a part of the consideration money, and that the residue was secured by a mortgage. Upon motion of the plaintiff, the plea was set down for argument, as to its validity in matter as well as in form; and the questions were argued by Rand for the plaintiff, and by Washburn for the defendant, Fuller.

STORY, J. The first question made at the bar is, whether, if the plaintiff asserts a legal title, the plea of a *bona fide* purchase for a valuable consideration, without notice, is a good bar in equity to a bill, like the present, which is for discovery and relief. Without doubt, a plea to the whole bill, which is bad in part, and good in part, may be allowed to the extent to which it is good, and overruled as to the residue. It may be good as to the discovery, and bad as to the relief. See Cooper, Eq. plead. 230; Mitf. Plead., 4th edit. by Jeremy, pp. 294, 295. Upon the question, whether a *bona fide* purchase for a valuable consideration, without notice, is a good plea in bar to a legal title asserted, as it certainly is to an equitable title, there is considerable contrariety in the authorities. Lord NOTTINGHAM is reported, in the case of Burlase *v.* Cooke, 2 Freeman, R. 24, to have held the plea to be a good bar. But he is said, in the subsequent case of Rogers *v.* Seale, 2 Freeman, R. 84, to have changed his opinion. Both these cases, however, are, as Mr. Sugden has well observed, very ill reported. Sugden on Vendors, 762, 7th edition. In Parker *v.* Blythmore, 2 Eq. Abridg. G. p. 79; S. C. Prec. Ch. 58, the Master of the Rolls held the plea good. Afterwards, in Williams *v.* Lambe, 3 Brown, Ch. R. 264, Lord THURLOW held the plea bad to a bill for discovery and relief. And in the later case of Jerrard *v.* Saunders, 2 Ves. Jr. R. 453, Lord LOUGHBOROUGH held the plea good, adhering to, and approving, the doctrine of Lord NOTTINGHAM in the case of

Basset *v.* Nosworthy, Finch, R. 102. The elementary writers, too, on this subject are as ill agreed as to the result of the authorities; Mr. Sugden adopting one view and Mr. Belt and Mr. Beames another. Sugden on Vendors, 762, 763, 7th. edition; Belt's note to 3 Brown, Ch. R. 263; Beames's Plead. in Equity, 234, 245. Mr. Chancellor KENT has come to the conclusion, that the rule in England is according to the decision of Lord THURLOW. Methodist Episcopal Church *v.* Jaques, 1 Johns. Ch. R. 74. If it were material to decide this point in the present case, I should take more time to consider it. It appears to me, that some of the cases admit of distinctions, which may reconcile them. There may be good ground to refuse a discovery against such a purchaser, when the bill might be maintained for relief. And there may also be good ground not to interfere with such a purchaser, so far as to take from him any paramount legal title, which he has honestly obtained; and yet, when this title is not paramount to the legal title of the plaintiff, to give him full relief. The case of dower before Lord THURLOW may stand upon this distinction; and perhaps others. But it is, in my judgment, wholly unnecessary to decide the point; and therefore I leave it for farther consideration. See Rancliffe *v.* Parkyns, 6 Dow, R. 149, 230; Walwyn *v.* Lee, 9 Ves. 24; Strode *v.* Blackmore, 3 Ves. R. 211. In Payne *v.* Compton, 2 Younge & Coll. 457, Lord ABINGER held the plea of a *bona fide* purchase for a valuable consideration without notice, was good in Equity as a defence against a plaintiff relying on a legal title.

The groundwork of the argument here fails; for it is not true, that the plaintiff does assert a title strictly legal in all aspects of the case. The argument insists, that the conveyance of the plaintiff to Adams was a mere nullity; not voidable, but utterly void. But, however it may be treated as between the original parties, in a loose and general sense, as a nullity, it is not so in fact, or in law. The title was voidable for the fraud, and not void. A *bona fide* purchaser, for a valuable consideration, and without notice, under the fraudulent grantee, would hold the estate at law against the original grantor. That doctrine has been repeatedly affirmed by this Court; and particularly in the case of Bean *v.* Smith, 2 Mason, R. 252, 272, &c. It has more recently been fully sanctioned by the Supreme Court of Massachusetts in Somes *v.* Brewer, 2 Pick. R. 184. So that, according to the well-established doctrine in this Commonwealth, the deed of the plaintiff to Adams cannot be treated as utterly void, but as voidable only. See Ricket *v.* Salway, 2 Barn. & Ald. R. 360; Fletcher *v.* Peck, 6 Cranch, R. 133.

Resort, then, is now had to a Court of Equity, not to enforce a legal title, but to obtain a declaration, that the original deed was fraudulently obtained, and of course to procure from the defendant, Fuller, a re-conveyance, if he purchased with notice, as the bill asserts in general terms that he did. The plaintiff asks for a discovery, which itself is equitable relief, for the purpose of having a surrender of the asserted fraudulent titles of the defendants, which is also equitable relief. Whatever, then,

may be the case, as to a purely legal title asserted in a Court of Equity, it does not strike me, that this can be treated as a case of that sort upon the actual structure of the bill and plea.

But it is very clear, that the plea furnishes no bar to the bill. In order to make it a good bar, it is necessary, that it should aver, that the whole consideration of the purchase had been paid before notice of the plaintiff's title. Now, the plea admits, that part of the purchase money has been paid, and that the residue is unpaid. It is plain, then, upon the unshaken doctrine of the authorities, that the plea is bad. Lord REDESDALE has laid down this doctrine in full and exact terms in his excellent work on Pleadings in Equity. Speaking upon the subject of a plea of this sort by a purchaser, he says: "It (the plea) must aver the consideration and actual payment of it; a consideration secured to be paid is not sufficient." Mitfords Pleadings, 4th edition, by Jeremy, p. 275; Cooper's Eq. Pleadings, 282. And he is fully borne out by authority. Hardingham *v.* Nicholls, 3 Atk. 304, is directly in point; and indeed the doctrine has passed into common axiom of equitable jurisprudence. Harrison *v.* Southcote, 1 Atk. R. 538; Story *v.* Lord Windsor, 2 Atk. 630; Jewett *v.* Palmer, 7 Johns. Ch. R. 65; Wormley *v.* Wormley, 8 Wheat. R. 449. Therefore I have no doubt, that the plea must be overruled. And the only question, then, will be, whether it should be overruled generally, or should be permitted to stand for an answer, with liberty to the plaintiff to except; for without such liberty, it would be establishing it as a good answer; Maitland *v.* Wilson, 3 Atk. R. 813; Sellon *v.* Lowen, 3 P. W. R. 239, or whether the benefit thereof should be reserved to the hearing of the cause, to avail, *quantum valre possit.* Lord REDESDALE has fully stated the appropriate effect of each of these courses: "If, (says he) upon argument the benefit of a plea is saved to the hearing, it is considered, that, so far as appears to the Court, it may be a defence; but that there may be matter disclosed in the evidence, which would avoid it, supposing the matter pleaded to be strictly true; and the Court, therefore, will not preclude the question. Where a plea is ordered to stand for an answer, it is merely determined, that it contains matter, which may be a defence, or part of a defence; but that it is not a full defence; or it has been informally offered by way of plea; or it has not been properly supported by answers, so that the truth of it is doubtful." Mitford's Pleadings in Eq. p. 303, 4th edition, by Jeremy. See also 1 Turner & Ven. Pr. p. 826, 6th edition. The same doctrine was held by Mr. Chancellor WALWORTH in Orcutt *v.* Ormes, 3 Paige, R. 459.

It appears to me, that the proper course in the present case is, to overrule the plea absolutely, and to order the party to answer generally; in which case he may insist upon the same matters of defence by way of answer, and have the full benefit of them. The matter of the plea does not furnish a complete bar to the bill; for even if the title in the defendant, Fuller, is unimpeachable, because he had no notice of the fraud or imposition; still, as the whole purchase money has not been paid, the plain-

tiff may be entitled to relief to the extent of the unpaid purchase money. It is unnecessary now to decide, whether, if the defendant stands in the predicament of a *bona fide* purchaser without notice, having paid part of the purchase money, the deed to him can be set wholly aside, or set aside *pro tanto;* or whether the remedy of the plaintiff against him is to have the residue of the purchase money paid over to him, if, upon the full hearing of the cause, the plaintiff establishes the case, as put forth in his bill. The other parties have an interest in the decision of these points; and therefore they should be reserved to the hearing.

But what is to me decisive for overruling the plea is, that it does not expressly and in terms deny, by proper averments, notice of the fraud and imposition, which are charged in the bill, and of which, (though in a very loose and inartificial manner,) the defendant, Fuller, is charged by the bill as having notice. It is clear, by the authorities, that it is not sufficient to deny generally notice of such facts, so charged, in the answer in support of the plea; but the answer must deny them specially and particularly, as charged in the bill. This was the decision of Lord HARDWICKE in Redford *v.* Wilson, 3 Atk. R. 815, and it has been constantly adhered to, as undoubted law. See Mitford on Plead., p. 276, 4th edition, by Jeremy; Cooper's Eq. Plead., p. 283, 238, 239; Beames's Plead. in Eq. p. 247; Jerrard *v.* Saunders, 2 Ves. Jr. R. 187; S. C. 4 Brown, Ch. R. 322; Senhouse *v.* Earl, 2 Ves. R. 450; Willis's Plead. in Eq. p. 568, note; Sugden on Vendors, p. 761, 7th edition; Rancliffe *v.* Parkyns, 6 Dow, R. 230.[1]

Plea overruled.[2]

[1] The balance of the case dealing with the question of pleading is omitted.

[2] "The defendant, May, avers, that the deed to him was executed and delivered on the 1st of March, 1819; and the subpœna and injunction in the case, were served on the 9th of March, 1819. Part of the consideration for the purchase by May, is averred to have been paid at the time of the execution and delivery of the deed, by the transfer and delivery to Palmer of several promissory notes, given by William Eaton to May, and which are alleged to have been good and valid. But another part of the consideration, viz., 100 dollars, was not paid until the 20th of March, 1819; and 527 dollars and 72 cents, not until the autumn of 1820. These payments were made, not only after the pendancy of the suit, which was notice in law, but after actual notice of the claim of the plaintiffs must be taken to have been received. They were, therefore, payments made by the defendant, M., in his own wrong, and his character as a purchaser will not protect him. A plea of a purchase for a valuable consideration, without notice, must be with the money actually paid: or else, according to Lord HARDWICKE you are not hurt. The averment must be, not only that the purchaser had not notice, at or before the time of the execution of the deeds, but that the purchase money was paid before notice. There must not only be a denial of notice before the purchase, but a denial of notice before the payment of the money. Harrison *v.* Southcote 1 Atk. 538. Story *v.* Lord Windsor, 2 Atk. 630. Even if the purchase-money be secured to be paid, yet if it be not in fact paid, before notice, the

PHILLIPS *v.* PHILLIPS.

IN CHANCERY, BEFORE LORD CHANCELLOR WESTBURY,[1] 1862.

[4 *De Gex, Fisher & Jones* 208.]

The Lord Chancellor [WESTBURY.]—When I reserved my judgment at the conclusion of the argument in this case, it was rather out of respect to that argument than from a feeling of any difficulty with regard to the question that had been so strenuously contested before me.

The case is a very simple one. The plaintiff claims as the grantee of an annuity granted by a deed dated in the month of February, 1820, to issue out of certain lands in the County of Monmouth, secured by powers of distress and entry. The annuity or rent-charge was not to arise until the death of one Rebecca Phillips, who died in the month of December, 1839, and the first payment of the annuity became due on the 8th of March, 1840.

The case was argued on both sides on the admitted basis that the legal estate was outstanding in certain incumbrancers, and is still outstanding. Subject to the annuity the grantor was entitled in fee-simple in equity. In February, 1821, the grantor intermarried with one Mary Phillips. On the occasion of that marriage, a settlement, dated in February, 1821, was executed, and under this deed the defendant's claim; and claim, therefore, as purchasers for a valuable consideration. No payment has ever been made in respect of the annuity.

plea of a purchase for valuable consideration, will be overrruled. Hardingham *v.* Nicholls, 3 Atk. 304." Per Chancellor KENT in Jewett *v.* Pelmer, 1823, 7 Johns. 65, 67.

[1] "The judgments which he has left are in many ways unique. Our law reports contain no more perfect examples of precise and lucid statement, of concise reasoning, or of polished English; and no judge has ever striven more persistently than did Lord WESTBURY to bring every question to the test of principle, and to restrain within due limits what seemed to him the excessive authority of precedents. His habit was to brush aside, or pass by unnoticed, the crowd of cases which had accumulated during the argument, to treat with scant respect judicial opinions which might stand in his way, and to come to his decision by the light of 'a few elementary rules of law'—a phrase which he had a malicious fondness for using when about to reverse Lord CAMPBELL. Following this method, indeed, he frequently decided a great deal more than the facts of the case required, and the authority of his judgments has been thereby much weakened: but where he had a comparatively clear field, as in the subject of domicile, he succeeded in building up a great portion of the existing law (see an estimate of his judgments in Campbell Smith's Writings by the Way, p. 397). With one exception, however, the cases in which he took part have only a legal interest." Article on Bethell, Richard, first Lord Westbury, in Dict. Natl. Biography.

The bill was filed within twenty years, and seeks the ordinary relief applicable to the case. The defendants by their answer insist that the deed was voluntary, and therefore void under the statute of Elizabeth as against them in their character of purchasers for valuable consideration, and they also insist upon the Statute of Limitations. But in the answer the defence of purchase for valuable consideration without notice is not attempted to be raised.

At the hearing, an affidavit of Mary Phillips and another person was produced denying the fact of notice of the annuity at the time of the grant and at the time of the creation of the marriage settlement, and the contention at the bar was that the defence of purchase for valuable consideration without notice was available for the defendants, under these circumstances, and ought to be allowed as a bar to the claim by the Court. The Vice-Chancellor in his judgment refused to admit the defence of the purchase for valuable consideration without notice, and I entirely agree with him in the conclusion that such a defence requires to be pleaded by the answer, more especially where an answer has been put in.

But I do not mean to rest my decision upon that particular ground because I have permitted the argument to proceed with reference to the general proposition, which was maintained before me with great energy and learning, viz., that the doctrine of a Court of Equity was this, that it would give no relief whatever to any claimant against a purchaser for valuable consideration without notice. It was urged upon me that authority to this effect was to be found in some recent decisions of this Court, and particularly in the case decided at the Rolls of The Attorney-General *v.* Wilkins, 17 Beav. 285.

I undoubtedly was struck with the novelty and extent of the doctrine that was thus advanced, and in order to deal with the argument it becomes necessary to revert to elementary principles. I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding), makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz., the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, "*Qui prior est tempore potior est jure.*" The first grantee is *potior*—that is, *potentior*. He has a better and superior—because a prior—equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers at the time when they took their securities and paid their money had notice of the first incumbrance or not. These elementary rules are

recognized in the case of Brace *v.* Duchess of Marlborough, 2 P. Wms. 491, and they are further illustrated by the familiar doctrine of the Court as to tacking securities. It is well known that if there are three incumbrancers, and the third incumbrancer, at the time of his incumbrance and payment of his money, had no notice of the second incumbrance, then, if the first mortgagee or incumbrancer has the legal estate, and the third pays him off, and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage which he has acquired, and to exclude the intermediate incumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title; for if the first mortgagee has not the legal title, the third does not by the transfer obtain the legal title, and the third mortgagee by payment off of the first acquires no priority over the second. Now the defence of a purchaser for valuable consideration is the creature of a Court of Equity, and it can never be used in a manner at variance with the elementary rules which have already been stated. It seems at first to have been used as a shield against the claim in equity of persons having a legal title. Bassett *v.* Nosworthy, Finch, 102, S. C. Bassett *v.* Nosworthy, 2 White & T. L. C. 1, is if not the earliest, the best early reported case on the subject. There the plaintiff claimed under a legal title, and this circumstance, together with the maxim which I have referred to, probably gave rise to the notion that this defence was good only against the legal title. But there appear to be three cases in which the use of this defence is most familiar:—

First, where an application is made to an auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir-at-law (which was the case in Bassett *v.* Nosworthy, Finch, 102; S. C., 2 White & T. L. C. 1,) or by a tenant for life for the delivery of title-deeds (which was the case of Wallwyn *v.* Lee, 9 Ves. 24,) and the defendant pleads that he is a *bona fide* purchaser for valuable consideration without notice. In such a case the defence is good, and the reason given is that as against a purchaser for valuable consideration without notice the Court gives no assistance; that is, no assistance to the legal title. But this rule does not apply where the Court exercises a legal jurisdiction concurrently with Courts of Law. Thus it was decided by Lord THURLOW, in Williams *v.* Lambe, 3 B. C. C. 264, that the defence could not be pleaded to a bill for dower; and by Sir. J. LEACH, in Collins *v.* Archer, 1 R. & M. 284, that it was no answer to a bill for fines. In those cases the Court of Equity was not asked to give the plaintiff any equitable as distinguished from legal relief.

The second class of cases is the ordinary one of several purchasers or incumbrancers each claiming in equity, and one who is later and last in time succeeds in obtaining an outstanding legal estate not held upon existing trusts or a judgment, or any other legal advantage the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a Court of

Equity. To a bill filed against him for this purpose by a prior purchaser or incumbrancer, the defendant may maintain the plea of purchase for valuable consideration without notice: for the principle is, that a Court of Equity will not disarm a purchaser, that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio.*

Thirdly, where there are circumstances that give rise to an equity as distinguished from an equitable estate,—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake,—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere.

Now there are three cases in which the defence in question is most commonly found. None of them involve the case that is now before me.

It was indeed said at the bar that the defendants, being in possession, had a legal advantage in respect of the possession, of which they ought not to be deprived. But that is to confound the subject of adjudication with the means of determining it. The possession is the thing which is the subject of controversy, and is to be awarded by the Court to one or to the other. But the subject of controversy, and the means of determining the right to that subject, are perfectly different. The argument, in fact, amounts to this: "I ought not to be deprived of possession, because I have possession." The purchaser will not be deprived of anything that gives him a legal right to the possession, but the possession itself must not be confounded with the right to it.

The case therefore that I have to decide is, the ordinary case of a person claiming under an innocent equitable conveyance that interest which existed in the grantor at the time when that conveyance was made. But, as I have already said, that interest was diminished by the estate that had been previously granted to the annuitant, and as there was no ground for pretending that the deed creating the annuity was a voluntary deed, so there is no ground whatever for contending that the estate of the person taking under the subsequent marriage settlement is not to be treated by this Court, being an equitable estate, as subject to the antecedent annuity, just as effectually as if the annuity itself had been noticed and excepted out of the operation of the subsequent instrument.

I have no difficulty, therefore, in holding that the plea of purchase for valuable consideration is upon principle not at all applicable to the case before me, even if I could take notice of it as having been rightly and regularly raised.

We next come to examine the authorities upon which the defence relies. Now, undoubtedly, I cannot assent to some observations which I find attributed to the Master of the Rolls in the report of the case of The Attorney-General *v.* Wilkins, 17 Beav. 285, but to the decision of that case, as explained by his Honor in the subsequent case of Colyer *v.* Finch, 19 Beav. 500, I see no reasonable objection, and the principles that

I have here been referring to are fully explained and acted on by the Master of the Rolls in the case of Colyer *v.* Finch, 19 Beav. 500. It is impossible, therefore, to suppose that he intended to lay down anything in the case of The Attorney-General *v.* Wilkins, 17 Beav. 285, which is at variance with the ordinary rules of the Court as I have already explained them, or which could give countenance to the argument that has been raised before me at the bar.

I have consequently no difficulty in holding that the decree of his Honor the Vice-Chancellor is right upon the grounds on which he placed it in the Court below, and that also it would have been right if he had considered the grounds which have been urged before me in support of this petition of rehearing. I therefore affirm the decree and dismiss the petition of rehearing; but inasmuch as the plaintiff sues *in formâ pauperis,* of course it must be dismissed without costs.

EYRE *v.* BURMESTER AND OTHERS.

IN THE HOUSE OF LORDS, 1862.

[10 *Clark's House of Lords* 90.]

The Lord Chancellor [WESTBURY] (20 May).—My Lords, the facts material for the decision of this appeal are few, and may be shortly stated. In October 1854 the late Mr. John Sadlier made a mortgage to the Appellant, Mr. Eyre, of certain estates in Ireland, to secure the payment by Sadlier to Eyre of considerable sums of money. Afterwards, and in September 1855, John Sadlier being very largely indebted to the London and County Joint Stock Bank, conveyed these estates and other large estates in Ireland to the Respondents, who represent the bank, to secure such debt and farther advances then made by the bank to Sadlier. No mention was made by Sadlier to the Respondents of the fact of the mortgage to Eyre; but the estates in question were conveyed by Sadlier to them as free from any incumbrance. Before this mortgage to the bank was completed by registration of the deeds in Ireland, the fact of Eyre's mortgage was discovered by the agents of the Respondents, who therefore refused to allow the arrangement between Sadlier and themselves to remain unless he obtained a release from Eyre of the estates in question. This Sadlier engaged to do; and he prevailed upon Eyre to execute a deed of reconveyance to Sadlier himself of these estates, in consideration of Eyre's receiving from Sadlier other securities of equal or greater value. The substituted securities consisted chiefly of a large number of shares in the Royal Swedish Railway, and of a promissory note for £12,000, expressed to be made and signed by Mr. Dargon. But

the shares were fictitious, having been fabricated by John Sadlier for the purpose, and the promissory note was a forgery. An actual fraud of a gross and criminal character was therefore committed by Sadlier upon Eyre; and by means of that fraud the release of Eyre's mortgage was obtained.

The release was obtained in a deed dated the 5th, but executed on the 13th of October 1855. By it Mr. Eyre reconveyed, granted, released, and confirmed unto John Sadlier the estates comprised in the mortgage deed of October 1854. No consideration for this reconveyance is expressed in the deed itself, but the real agreement between the parties is contained in a contemporaneous agreement of the 6th of October 1855.

After the execution of this deed of reconveyance to John Sadlier no farther conveyance was made by Sadlier to the Respondents. They were assured of the fact of the reconveyance, and the mortgage was either completed or allowed to continue. The estate so reconveyed by Eyre remained in John Sadlier until he committed suicide in the month of February 1856. On that event, the fraud of Sadlier was discovered.

These estates have been since sold by an order of the Incumbered Estates Court in Ireland. With respect to the proceeds of that sale, a contest has arisen between Eyre and the London and County Bank; Eyre claims the benefit of his original mortgage, and insists that the reconveyance is void for fraud. The bank directors claim the benefit of the reconveyance as purchasers for valuable consideration, without notice of the fraud committed by Sadlier on Eyre, and on that ground the Court below has given judgment in their favour.

A purchaser for valuable consideration without notice, will not be deprived by a Court of Equity of any advantage at law which he has fairly obtained for his protection. But in the present case the estate reconveyed by Eyre, remained in Sadlier, and was never conveyed by Sadlier to the bank. In answer to this objection, the Respondents insist on the estoppel created by the previous conveyance. This answer would be good as against Sadlier and all claiming under him. The estoppel created by the antecedent contract and conveyance by Sadlier would bind parties and privies, that is, Sadlier and those claiming under him. But the claim of Eyre is against Sadlier by paramount right, to recover the estate of which Eyre had been deprived by fraud, and Sadlier acquired no interest to feed his prior contract by virtue of that fraudulent transaction.

It is urged by the Respondents that the reconveyance when made by Eyre, enabled Sadlier to obtain money from the bank, and that the mortgage was completed on the faith of the reconveyance. The evidence does not appear to me to prove either of these positions. But granting that it does, the reconveyance was to Sadlier and was obtained by him by fraud and covin. There was no contract or direct communication between the Respondents and Eyre, who acted with perfect *bona fides*. The Respondents left Sadlier to obtain the reconveyance, and they can claim

the benefit of it only under Sadlier, whose act they must take as it is. If (which is not proved) they had advanced money to Sadlier on the faith of the release and their actual possession of it, but without taking a conveyance, they might have had a lien on the deed itself; but their interest in the estate being equitable only, would still, in my opinion, have been subject to the superior equity of Eyre. Whilst the estate remained in Sadlier, so long was it liable to be pursued and recovered by Eyre. But there is no sufficient proof of any such advance by the bank; and the only foundation of the bank's claim, is the mortgage by Sadlier prior to the deed of reconveyance. That mortgage and contract would bind any interest subsequently acquired by Sadlier. But under the reconveyance he obtained none; for, as between Sadlier and Eyre, the latter was still the owner, and might at any time during the life of Sadlier, by bill in equity, have set aside the release, and obtained a reconveyance of the estate, and an interim injunction to restrain any alienation of it by Sadlier. This equitable title still remains unimpaired, and ought to be preferred to any claim by the bank.

I therefore advise your Lordships that the orders of the Court below be reversed, and that it be declared that the claim of the Appellant to priority in respect of his mortgage, ought to have been allowed; and that the case be remitted, with that declaration, to the Landed Estates Court. If the Appellant has obtained any additional security under the agreement of the 6th October 1855, not comprised in his original mortgage, that must be given up or accounted for to the bank.[1]

CAVE *v.* CAVE.

IN THE CHANCERY DIVISION, 1880.

[*Law Reports,* 15 *Chancery Division* 639.]

The plaintiffs were *cestuis que trustent* under the settlement executed on the marriage of Mr. and Mrs. Frederick Cave. The defendant, Charles Cave, was the sole trustee. Part of the trust funds which came into his hands, he invested in certain freeholds, improperly acting in the transaction both as trustee and as solicitor for himself and Frederick Cave, in whose name the conveyance was made though the deeds were held by Charles. Later other lands were purchased under similar illegal circumstances. After these purchases, the defendant Chaplin, Charles Cave, acting as his solicitor, took a mortgage from Frederick on this land, and the question arose whether or not the knowledge of his solicitor, Charles Cave, was constructive notice to him. Subsequently, the other

[1]The concurring opinions of Lords CRANWORTH, CHELMSFORD and KINGSDOWN are omitted.

defendants took mortgages on the same property, without notice of the first mortgage.

In April, 1879, Frederick Cave became a bankrupt, and the Plaintiffs claimed to prove against his estate for these breaches of trust, and they also claimed priority over all the liens claimed on the land by the several Defendants, on the ground that when they took their charges they had constructive notice of the breach of trust.

The Defendants denied that they had notice, and relied especially on the fraud of Charles Cave as a circumstance raising a presumption that he would not have communicated the circumstances of his fraud to the mortgagees.[1]

FRY, J., stated the facts, and continued:—[2]

Between the Plaintiff and Chaplin the course of argument has been this: It has been proved that the same solicitor, Mr. Charles Cave, who was also surviving trustee, acted in the matter of Chaplin's mortgage both for Chaplin and for the mortgagor, Frederick Cave. The Plaintiffs say, "You employed the same solicitor as the mortgagor, and you therefore had knowledge of the circumstances affecting Frederick Cave's title against us." To that Chaplin replies that Charles Cave was a party to a fraud, and that the circumstances are such as to render it impossible to conceive that the facts which were known to Charles Cave were communicated by him to Chaplin.

The question I have to determine is whether the Defendant Chaplin is right or wrong in that contention.

The doctrine applicable to the question has been commonly called that of constructive notice. Lord CHELMSFORD, in the case of Espin *v.* Pemberton, 3 De G. & J. 547, considered that to be an inaccurate description, and thought that the expression "imputed notice" was the correct one. It is not very material to consider which of the two terms is the more accurate, because there is undoubtedly an exception to the construction or imputation of notice from the agent to the principal, that exception arising in the case of such conduct by the agent as raises a conclusive presumption that he would not communicate the fact in controversy. This exception has been put in two ways. In the very well-known case of Rolland *v.* Hart, Law Rep. 6 Ch. 678, Lord HATHERLEY put it substantially in this way, that you must look at the circumstances of the case, and inquire whether the Court can see that the solicitor intended a fraud, which would require the suppression of the knowledge of the incumbrance from the person upon whom he was committing the fraud. In Thompson *v.* Cartwright, 33 Beav. 178, the late Master of the Rolls put it rather differently, and it would appear that in his view you must inquire whether there are such circumstances in the case, independently of the fact under inquiry, as to raise an inevitable conclusion that the notice had not been communicated. In the one view

[1] The statement of facts has been abridged.

[2] The opening sentences of the opinion are omitted.

notice is not imputed, because the circumstances are such as not to raise the conclusion of law, which does ordinarily arise from the mere existence of notice to the agent; in the other view—that of Lord CHELMSFORD and Lord HATHERLY—the act done by the agent is such as cannot be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal, and that is not to be imputed to the principal as an act done by his agent.

Those being the principles to the decision of this case, I must ask myself what are the circumstances.[1]

The conclusion I arrive at is, that Chaplin has sustained the burden cast upon him of proving that the circumstances are such as repel the construction or imputation to the principal of notice to the agent. Therefore I hold that Mr. Chaplin's mortgage has a priority over the Plaintiffs'.

The next question arises between the Plaintiffs and White, and also between all the other incumbrancers upon the fund. That question is of this nature: all these incumbrancers allege that they are purchasers for value without notice, and they plead that, being purchasers for value without notice, they have a sufficient and conclusive defence. That defence, as we all know, has been the subject of a great deal of decision, and it is by no means easy to harmonise the authorities and the opinions expressed upon the subject. Criticisms upon old cases lie many strata deep, and eminent Lord Chancellors have expressed diametrically opposite conclusions upon the same question. The case of Phillips *v.* Phillips, 4 D. F. & J. 208, is the one which has been principally urged before me, and that, as being the decision of a Lord Chancellor, is binding upon me, notwithstanding the subsequent comments upon it of Lord ST. LEONARDS in his writings. That case seems to me to have laid down this principle, that, as between equitable interests, the defence will not prevail where the circumstances are such as to require that this Court should determine the priorities between them. The classes of cases to which the defence will apply are other than that.[2]

Now the question I have to determine is this, is the right of the parties to follow this money into the land an equitable estate or interest, or is it an equity as distinguished from an equitable estate? The decision of Lord ELDON many years ago appears to me to be perfectly conclusive upon the law. I refer to the case of Lewis *v.* Madocks, 17 Ves. 48, 57, where on further consideration directions had been given for an inquiry as to certain trust moneys which had gone into land, the wife claiming an interest in the land as against the heir; and Lord ELDON said this: "The claim of the wife is put in this way, that personal property bound by the trust or obligation, whatever it is called, of this bond is traced into the purchase of a real estate, which estate must

[1] The discussion of the circumstances is omitted.

[2] A part of the opinion, quoting from Lord WESTBURY, has been omitted.

therefore be hers; but I do not know any case in its circumstances sufficiently like this to authorize me to hold that doctrine. I am prepared to say that the personal estate bound by this obligation, and which has been laid out in this real estate, is personal property that may be demanded out of the real estate that the estate is chargeable with it; but it was not so purchased with it, that the estate should be decreed to belong not to the heir but to the wife." In other words, his Lordship held that the estate descended to the heir subject to the charge. That charge appears to me to be a charge in equity, or, in other words, an equitable estate or interest. Very similar was the question which Vice-Chancellor KINDERSLEY had to determine in the case of Rice *v.* Rice, 2 Drew, 73. He had there to adjudicate between two equities, one arising from the right of an unpaid purchaser to come upon the land, and the other arising by contract creating an equitable mortgage. It is a very leading and instructive case, in which the Vice-Chancellor considered very fully the application of the maxim, "*Qui prior est tempore potior est jure,*" and laid it down thus: "To lay down the rule with perfect accuracy, I think it should be stated in some such form as this. As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity, or, '*Qui prior est tempore potior est jure.*'"[1]

In my judgment, the right of a vendor for the unpaid purchase-money is an equitable lien, and the right of the *cestui que trust,* whose trust money has been invested in the lands, is also an equitable lien. I do not think I can really distinguish this equity from such an equitable lien as the Vice-Chancellor held to be in that case an equitable estate or interest of the same description as the equity of an equitable mortgagee. Therefore I shall conclude that, within the case of Phillips *v.* Phillips, 4 D. F. & J. 208, the interest of the Plaintiff in this case is an equitable interest, and not merely an equity like the equity to set aside a deed, and therefore it must take its priority according to the priority of date.

MURRAY AND WINTER *v.* BALLOU AND HUNT.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1815.

[1 *Johnson's Chancery* 566.]

The Chancellor [KENT]. The purchase, by Ballou, of Winter was made in August, 1810. The lot purchased was held, at the time, by Winter, in trust, for Temperance Green; and a suit was then, and for a year preceding had been, pending in this court by Mrs. Green

[1] Justice FRY here made a further quotation from Rice *v.* Rice, which is printed in full, *supra.*

against Winter, charging him with a breach of trust, and praying that his authority as trustee, might cease; and an injunction had been issued and served, enjoining him from any sale, disposition, or use of any of the lands or securities held by him in trust. The plaintiff, Murray, was, afterwards, appointed receiver, with authority to sue; and upon a reference and report, which took place in the progress of the suit, Winter was found in arrear to the amount of 20,510 dollars; and the amount of the above sale to Ballou, as being invalid and not binding on the *cestui que trust,* was not allowed as a charge to Winter. By the final decree, Winter was ordered to convey and surrender to Mary Green and Henry Green, the person for that purpose appointed by Mrs. Green, all the property and interest whatever held by him in trust.

The suit so commenced against Winter, having been in a course of continued and diligent prosecution, and having been finally conducted to a decree by which the charges in the bill were established, a question arises, and has been discussed in this case, whether the purchase by Ballou, of part of the trust property, *pendente lite,* is binding on the *cestuy que trust?*

Ballou has, in his answer, denied any knowledge of the suit at the time of his purchase. There is no proof to contradict the answer, and it is to be taken for true. But though he had no knowledge of the suit, it is not pretended that he was ignorant of the existence of the trust; and it is to be presumed, from his silence, that when he purchased from Winter, he knew that Winter held and sold the land, not in his own right, but as trustee. The bill charges, that it was generally known, at the time of the sale, that Winter's authority was questioned. The answer goes no further than to deny any knowledge of the chancery suit, or of the injunction, or of any suspension or defect of power in Winter to sell. The answer of Hunt is to the same limited extent; and the probability is, that it was a matter of public notoriety at the time, that Winter held the large real estate in his possession as a trustee.

It has been said by the counsel for the plaintiffs, that Ballou was chargeable with notice of the trust, by means of the registry of the deed from Heatley to Mrs. Green, which recited the declaration of trust executed by Winter. This deed, containing this recital, was registered on the 9th of April, 1810, but I cannot perceive any justice in obliging Ballou to take notice of the contents of that deed. By what clue was he to be directed to look into the deed from Heatley to Mrs. Green? He was dealing with Winter; and supposing Winter's trust to be, otherwise, totally unknown to him, he might as well be required to examine the contents of every deed on record. If there had been any deed on record to which Winter was a party, he would have had a specific object and guide for inquiry; *cæca regens filo vestigia.* I have, therefore, not thought it reasonable to charge Ballou with a knowledge of the existing trust, by reason of the registry of Heatley's deed, but rather to infer that knowledge from what is charged in the bill, and from the silence

and the strong implied admission in the answer. The inference from the answer is decisive. If a party means to defend himself, on the ground that he was a *bona fide* purchaser for a valuable consideration, without notice of a trust, he must deny the fact of notice, and of every circumstance from which it can be inferred. Bodmin *v.* Vandenbendy, 1 Vern. 179; Anon. 2 Vent. 361; 3 P. Wms. 244. n; 2 Vesey, jun. 458; 9 Vesey, jun. 32. And if notice of the trust existed when the purchase was made, then the general rule is, that the purchaser becomes himself the trustee, notwithstanding any consideration paid; Saunders *v.* Dehew, 2 Vern. 271; 2 Fonb. 152, 153; and, though he may not, perhaps, be bound, in most cases, if the sale is fair, to look to the application of the moneys, yet, if the trust be suspended by process of the court, and the sale be made, as it was here, in contempt of that process, the purchaser, with notice, ought not to be allowed to defeat it. The question of notice of the trust is also material, inasmuch as the purchaser's knowledge of it goes to lessen or destroy the hardship, if any there should be, in the application of the maxim, *caveat emptor.* If every man purchases at his peril, and is bound to look to the title and the competency of the seller, the duty is the stronger, if he knowingly purchases of one acting as agent or trustee for others, for then he is bound to look into the validity and the continuance of the authority, and to call for an explanation of the nature and existing circumstances of the trust.

But it will not be necessary to rest the cause on this ground. The other point, which has been pressed for consideration, appears to be altogether conclusive. Admitting that Ballou had no knowledge, in fact, of the suit of Mrs. Green against Winter, when he made the purchase, he is, nevertheless, chargeable with legal or constructive notice, so as to render his purchase subject to the event of that suit. The established rule is, that a *lis pendens,* duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the *subpœna* after the bill is filed.

The counsel for the defendants have made loud complaints of the injustice of this rule, but the complaint was not properly addressed to me, for if it is a well-settled rule, I am bound to apply it, and it is not in my power to dispense with it. I have no doubt the rule will sometimes operate with hardship upon a purchaser without actual notice; but this seems to be one of the cases in which private mischief must yield to general convenience; and, most probably, the necessity of such a hard application of the rule will not arise in one out of a thousand instances. On the other hand, we may be assured the rule would not have existed, and have been supported for centuries, if it had not been founded in great public utility. Without it, as has been observed in some of the cases, a man, upon the service of a subpœna, might alienate his lands, and prevent the justice of the court. Its decrees might be wholly evaded. In this very case, the trustee had been charged with a gross breach of

his trust, and had been enjoined by the process of the court, six months before the sale in question, from any further sales. If his subsequent sales are to be held valid, what temptation is held out to waste the trust property, and destroy all the hopes and interest of the *cestuy que trust?* A suit in chancery is, in such cases, necessarily tedious and expensive, and years may elapse, as in this case, before the suit can be brought to a final conclusion. If the property is to remain all this time subject to his disposition, in spite of the efforts of the court to prevent it, the rights of that helpless portion of the community, whose property is most frequently held in trust, will be put in extreme jeopardy. To bring home to every purchaser the charge of actual notice of the suit, must, from the very nature of the case, be in a great degree impracticable. The only safe and efficient means of preventing such fraud and injustice, is to charge the purchaser with dealing with the trustee at his peril. The policy of the law does, in general, cast that peril upon the purchaser. *Caveat emptor,* is the settled maxim of the common law. It is his business to inquire and to look to the person with whom he deals. If he knows him to be a trustee, then let him inquire of the *cestuy que trust,* or let him ask at the register's office, whether there be any suit pending against such trustee. He can always be safe if he uses due diligence; but the other party has no means of safety beyond his application to the court. Whatever may be thought of the rule, it appears to me to be less severe than that acknowledged rule of the common law, on which our courts have repeatedly acted, that a conveyance of land, without any warranty or covenant of title, will not enable the purchaser to resort back to the seller, even if the title should fail. Frost *v.* Raymond, 2 Caines' Rep. 188; and if he has covenants to secure his title, he can seek for no more than the consideration which he has paid, without any allowance for the rise in value of the land, or the value of the improvements. Pitcher *v.* Livingston, 4 Johns. Rep. 1.

I have said that the *lis pendens* was, of itself, notice to the purchaser, and it will now be proper to show that this rule is well established in our law. It is no more than an adoption of the rule in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation. It was one of the ordinances of Lord BACON, laid down *for the better and more regular administration of justice in the court of chancery,* that "no decree bindeth any that cometh in *bona fide,* by conveyance from the defendant, before the bill exhibited, and is made no party, neither by bill nor order: but where he comes in *pendente lite,* and while the suit is in full prosecution, and without any colour of allowance or privity of the court, there regularly the decree bindeth." Lord BACON'S works, vol. 4. 511. Here we find the rule declared above two centuries ago, and by the highest authority to which we can appeal; and it will appear to have received support and application down to this day. In the case of Martin *v.* Stikes (cited by Lord NOTTINGHAM, in his *Prolegomena of Equity,*

and, again, in 11 Ves. 200), the bill was filed in 1640, and was abated, by death, in 1648; and a bill of revivor was filed in 1662, and the purchase was made in 1651, and yet, as the purchase was, by relation of the bill of revivor, made *pendente lite*, the purchaser was held bound, and by no less a character than Lord CLARENDON. I cite this case, not with approbation, but merely to show the great extent to which the rule has been anciently carried. When this very case was, afterwards, in a new shape, brought before Lord Keeper BRIDGMAN, 1 Cas. in Ch. 150 he observed, that it was not *form*, but the substance of a decree, that all are bound by it who come in, *pendente lite*. The case of Culpepper *v.* Austin, which was a few years subsequent, 2 Ch. Cas. 115, 221, is a strong determination on the same point: in that case the testator had conveyed his lands to his executors, in fee, to pay his debts; and after his death the defendant purchased the lands of the executors for a valuable consideration. The heir brought his bill, to have the land, on the ground that the lands were not wanted to pay debts; and the Lord Chancellor held, that the suit pending between the heir and the trustee, to have an account, was sufficient notice, in law, without actual notice of the suit, and the party purchased at his peril; so that if, in the event of the suit, it appeared that the sale was unnecessary and improper, the heir would recover against the purchaser. It turned out, afterwards, that the defendant lost his purchase, though he had no actual notice of the suit, and though he had purchased and paid the same day the bill was exhibited. Vide, as to this result, what was said by the Chancellor in Baens *v.* Canning, 1 Ch. Cas. 301. The case of Fleming *v.* Page and Blaker arose during the time of Lord NOTTINGHAM, Rep. temp. Finch, 321. These were purchases made by the defendants for a valuable consideration, but they were made *pendente lite*, and for that reason the purchasers were decreed to reconvey and deliver up the writings. The same general principal, that all persons who come in as purchasers, *pendente lite*, though they are no parties to the suit, they and their interests shall be bound and avoided by the decree, is laid down as the known law, in several cases to be found in Vernon, and to which it will be sufficient only to refer. Preston *v.* Tubbin, 1 Vern. 286; Anon. 1 Vern. 318; Goldson *v.* Gardner, cited in Self *v.* Madox, 1 Vern. 459; Finch *v.* Newnham, 2 Vern. 216.

If we come down to more modern times, when the principles of equity may be supposed to have been more highly cultivated, and more precisely defined, we shall find the rule recognised with equal force. Thus, in Sorrel *v.* Carpenter, 2 P. Wms. 482, the defendant purchased an estate, *pendente lite*, from one Ligo, after subpœna served on Ligo, and before answer, for the full value, and without any notice of the plaintiff's title, or actual notice of the suit. This was the strongest case that could be imagined, and under circumstances far more favourable to the purchaser than the present; and Lord Chancellor KING said, that it was a very hard case to set such a purchase aside, yet he admitted that such was

the rule, and that it was taken from analogy to alienations pending a real action at law. This doctrine came frequently under the review of Lord HARDWICKE, and he always held that a purchaser, *pendente lite*, was bound by the decree in the suit. The pendency of the suit was, of itself, notice; and he observed, that the rule was to prevent a greater mischief that would arise by people's purchasing a right under litigation. Garth *v.* Ward, 2 Atk. 174; Worsley *v.* Scarborough, 3 Atk. 392. Lord CAMDEN, afterwards, enforced the same rule. "I hold it," he said, "as a general rule, that an alienation pending a suit is void." Walker *v.* Smalwood, Amb. 676. I shall conclude this view of the English authorities with noticing the observations of the Master of the Rolls in the case of The Bishop of Winchester *v.* Paine, 11 Ves. 194. "He who purchases during the pendency of the suit, is bound," says Sir WILLIAM GRANT, "by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them it is as if no such title existed. Otherwise, suits would be interminable, or which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined. The rule may sometimes operate with hardship, but general convenience requires it."

It would be impossible, as I apprehend, to mention any rule of law which has been established upon higher authority, or with a more uniform sanction; and I should have thought it necessary to apologize for wasting so much time on the point, if I had not found the rule, ancient and stable as it is, questioned and resisted by plausible considerations addressed to the feelings. I may, also, be permitted to add, that as I am without the aid of any public reports, or any distinct knowledge of the decisions of this court during the time of my predecessors, I am obliged, in almost every case, to reassert, expound, and vindicate the principles of our equity jurisprudence. Many a point is now raised which would, probably, never have been disturbed, if the means had been afforded to learn the doctrines of the court; and it cannot be too often repeated, and too deeply impressed, that established principles in equity can no more be dispensed with than the rules of law, and for this plain reason, that I am not clothed with a dispensing power.

The persons in whose behalf this suit was instituted are, consequently, entitled to a conveyance of the land sold to Ballou, equally as if the title had remained in Winter. The suit is, also, against Hunt, the assignee of the bond and mortgage given by Ballou; and the counsel for the plaintiffs seek either the land or the proceeds of the sale, and appear to be equally willing to accept of either. Hunt purchased the bond and mortgage, as he says, without knowing or inquiring as to the consideration for which they were given; and though he took them subject to all the equitable claims of Ballou, yet, as between him and the plaintiffs, the question may not be the same; and I think it will be unnecessary for me to decide, at present, whether the doctrine of this case reaches him,

so as to protect from assignment all the bonds and other securities taken by Winter in his character of trustee.

This point underwent much discussion in the House of Lords, in Redfearn *v.* Ferrier and others, 1 Dow's Rep. 50; and it was there held, on appeal in a Scotch case, that a latent equity, in a third person, shall not defeat a *bona fide* assignee of a right without notice, except it be an assignment by an executor, which carried on the face of it notice of his fiduciary character. See p. 54, 59, 60, 66, 72.

The claim raised by the bill against Ballou, for the land, and against Hunt, for the proceeds of the sale, are inconsistent with each other; for the one annuls, and the other affirms, the sale. The claim to the land is clear of all difficulty, and comes within all the cases; and the only use I shall make of the demand in the alternative, for the lands or the proceeds, will be to relieve Ballou as far as it is possible from the loss of his improvements, by giving him the alternative, to convey the land, or keep the land, and pay the amount of the consideration he gave, together with the interest thereon.

MURRAY AND WINTER *v.* LYLBURN AND OTHERS.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1817.

[2 *Johnson's Chancery,* 441.]

The Chancellor [KENT]. The question is, whether the executors of Lylburn are to be held accountable to the *cestui que trusts* (in whose behalf Murray, as receiver, instituted the suit) for the bond and mortgage, in like manner as Winter may be, or would have been, had he not assigned them.

The case states, that the bill has been taken *pro confesso* against Sprague, the purchaser, and against Davis, who holds under him. It also states, that Davis is in possession.

The *cestui que trusts* are not entitled to the land, and also to the purchase-money. The two claims, as I observed in the analogous case of Murray *v.* Ballou and Hunt, 1 Johns. Ch. Rep. 581, are inconsistent with each other. The one sets aside, and the other affirms the sale. If the *cestui que trusts* choose to disregard the alienation made by the trustee, pending the suit against him (as they may do, according to the settled doctrines of the Court), then they have nothing to do with these securities, but are to look solely to the land, taking no notice of the alienation by Winter. They ought to be put to their election. I am inclined to think they may, if they please, affirm the sale, and look to these

securities; and if they do, then the bill, as against Sprague and Davis, ought to be dismissed.

It is a general and well-settled principle, that the assignee of a *chose in action* takes it subject to the same equity it was subject to in the hands of the assignor. 2 Vern. 691, 764; 1 P. Wms. 496; 1 Ves. 123; 4 Vesey, jun. 21. But this rule is generally understood to mean the equity residing in the original obligor or debtor, and not an equity residing in some third person against the assignor. He takes it *subject to all the equity of the obligor,* say the judges in the very elaborately argued case of Norton *v.* Rose, 2 Wash. Rep. 233, 254, on this very point, touching the rights of the assignee of a bond. The assignee can always go to the debtor, and ascertain what claims he may have against the bond, or other *chose in action,* which he is about purchasing from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries; and, for this reason, the claim of the assignee, without notice of a *chose* in action, was preferred, in the late case of Redfearn *v.* Ferrier and others, 1 Dow. Rep. 50, to that of a third party setting up a secret equity against the assignor. Lord ELDON observed, in that case, that if it were not to be so, no assignments could ever be taken with safety. I am not aware that this decision was the introduction of any new principle, in the case of actual *bona fide* purchases or assignments *by contract;* though Lord THURLOW said, in one case, 1 Vesey, jun. 249, that the purchaser of a *chose in action* must abide by the case of the person from whom he buys; but he spoke this on a question between the assignee and the debtor. In assignments, by *operation of law,* as to assignees of bankrupts, the case may be different; for such assignments are said to pass the rights of the bankrupt, subject to all equities, and precisely in the same plight and condition as he possessed them. 1 Atk. 162; 9 Vesey, 100. The ground, however, on which I place the right of the *cestui que trusts,* in this case, to pursue the bond and mortgage in the hands of the assignee of Winter, is the constructive notice to all the world, arising from the bill and supplementary bill, filed in 1809, against Winter, for a breach of trust. The object of that suit was to take the whole subject of the trust out of his hands, together with all the papers and securities relating thereto. If Winter had held a number of mortgages, and other securities, in trust, when the suit was commenced, it cannot be pretended, that he might safely defeat the object of the suit, and elude the justice of the Court, by selling these securities. If he possessed cash, as the proceeds of the trust estate, or negotiable paper not due, or perhaps movable personal property, such as horses, cattle, grain, &c., I am not prepared to say the rule is to be carried so far as to effect such sales. The safety of commercial dealing would require a limitation of the rule; but bonds and mortgages are not the subject of ordinary commerce; and they formed one of the *specific* subjects of the suit against Winter, and the injunction prohibited the sale and assignment

of them as well as of the lands held in trust. If the trustees, pending the suit, changed the land into personal security, as he did in this case, I see no good reason why the *cestui que trusts* should not be at liberty to affirm the sale, and take the security; and whoever, afterwards, purchased it, was chargeable with notice of the suit. He was dealing with a subject out of the ordinary course of traffic, and always understood to be subject to certain equities; and there can be very little ground for the complaint of hardship in the application to such a case, of the general doctrine of the Court. There is no principle better established, nor one founded on more indispensable necessity, than that the purchase of the subject matter in controversy, *pendente lite,* does not vary the rights of the parties in that suit, who are not to receive any prejudice from the alienation. The latent equity here might easily have been discovered by Lylburn, when he purchased, by applying to the records of this Court. If the *cestui que trust* be entitled, as between him and his trustee, to take the securities or the land, at his election, it ought not to be in the power of the trustee to defeat that election, by selling the securities. The litigating parties are not to have their rights affected by any alienation during the pendency of the suit.

This doctrine was fully considered, and the authorities reviewed, in the case of Murray *v.* Ballou, 1 Johns. Ch. Rep. 566, and I do not know that it is in my power to add anything material to what was there said. That case must be considered as the established law in this Court. If it were necessary to give further proof of the uncontradicted existence and uniform support of the rule, I might refer to the ancient rule at law, Jackson *v.* Ketchum, 8 Johns. Rep. 479, that a purchase of land, pending a suit concerning it, was champerty. It was also the maxim of the common law that *pendente lite nihil innoventur.* In the recent case of Metcalf *v.* Pulvertoft, 2 Ves. & Beame, 200, the English Vice-Chancellor reviewed the cases, and vindicated this doctrine. So, in the case of Gaskell *v.* Durdin, 2 Ball & Beatty, 167, the present Lord Chancellor of Ireland declared the rule in the following clear and emphatical language: "The rule of this Court undoubtedly is, that any interest acquired *in the subject matter of a suit,* pending the suit, is so far considered as a nullity, that it cannot avail against the plaintiff's title; and if this rule were not attended to, there would be no end to any suit; the justice of this Court would be evaded, and great hardship and inconvenience to the suitor necessarily introduced. It is extremely difficult to draw any line, and *very dangerous to allow of the rule being fritted away by exceptions.*"

I shall, accordingly, decree, that the plaintiffs, by their solicitor, signify, by an election in writing, signed by such solicitor, and filed in the register's office, their determination whether to proceed against the defendants Sprague and Davis for the land, or against the defendants Lylburn and Isham for the bond and mortgage mentioned in the pleadings. That if such election be to proceed against the defendants Sprague

and Davis, then the bill, as against the defendants Lylburn and Isham shall, from the time of filing such writing, stand dismissed and the defendants S. and D. shall, within thirty days, convey the lot in the pleadings mentioned to the present trustees, &c., and pay the costs of the suit against them; but that if such election be to proceed against the defendants Lylburn and Isham, then the bill, as against the defendants Sprague and Davis, shall, from the time of filing such writing, stand dismissed, and the said defendants Lylburn and Isham shall, within thirty days from the service of a copy of this decree, and of such election, at their own expense, reassign and deliver to the said solicitor, or his order, for the use of the *cestui que trusts,* for whose benefit this suit was instituted, the said bond and mortgage together with all the right and interest of their testator, at the time of his death, therein, and shall also pay the sum of 157 dollars and five cents, which they have admitted, by their answer, to have been received by their testator, on the bond and mortgage, subsequent to the assignment thereof, together with lawful interest thereon, from the 30th of November, 1811, when it was received; and that if the plaintiffs shall not make and file their election, as aforesaid, within forty days from the date of this decree, then the bill, as to all the defendants, shall be dismissed.

As to the question of costs, I have not charged the executors with costs, because there is no evidence that their testator purchased the securities under any other than constructive notice of the suit against Winter; and actual notice denied. The case, therefore, falls within the decision in Murray *v.* Ballou. But Sprague and Davis are made chargeable, in one event, with costs, because they are charged with notice, in fact, of the suit and injunction, and they have admitted it, by suffering the bill to be taken *pro confesso.* And in the cases in which the bill is to be dismissed, there having existed a just cause of suit, which is lost only in consequence of an election, or a default founded upon the direction in the decree, the defendants, even then, will have no equity to entitle them to the costs of the suit, and the dismissal is to them a favor.

Decree accordingly.

In COUNTY OF WARREN *v.* MARCY (1877) 97 U. S. 96, 105-106, Mr. Justice BRADLEY said: It is a general rule that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril, purhase the same from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way. This exception was suggested by Chancellor KENT, in one of the leading cases on the subject in this country, and has been confirmed by many subsequent decisions.

The learned Chancellor gave the history and grounds of the general doctrine of *lis pendens*, in 1815, in the case of Murray *v.* Ballou, 1 Johns., N. Y., Ch. 566, which is the leading American case on the subject, and deserves the careful study of every student of law. The fundamental proposition was stated in these words: "The established rule is, that a *lis pendens*, duly prosecuted, and not conclusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed." p. 576. That case related to land, with regard to which the doctrine is uniformly applied.

In the subsequent case of Murray *v.* Lylburn, 2 id. 441, decided in 1817, the same doctrine was held to apply to choses in action (in that case, a bond and mortgage) assigned by one of the parties *pendente lite*. But the Chancellor, with wise prevision, indicated the qualification to which the rule should be subject in such cases. Speaking of the trustee, whose acts were in question, he said: "If Winter had held a number of mortgages, and other securities, in trust, when the suit was commenced, it cannot be pretended that he might safely defeat the object of the suit, and elude the justice of the court, by selling these securities. If he possessed cash, as the proceeds of the trust estate, or negotiable paper not due, or perhaps movable personal property, such as horses, cattle, grain, etc., I am not prepared to say the rule is to be carried so far as to affect such sales. The safety of commercial dealing would require a limitation of the rule; but bonds and mortgages are not the subject of ordinary commerce; and they formed one of the specific subjects of the suit against Winter, and the injunction prohibited the sale and assignment of them, as well as of the lands held in trust."

Here we have the whole law on the subject. Subsequent cases have only carried it out and applied it.[1]

BEDFORD *v.* BACKHOUSE.

IN CHANCERY BEFORE LORD CHANCELLOR KING, 1730.

[2 *Equity Cases Abridged* 615, *pl.* 12.]

A. lent money on a Mortgage of Lands in Middlesex, and the Mortgage was duly registered. Afterwards B. lent Money on the same Security, and his Mortgage was registered. Then A. advanced a further Sum upon the same Lands, without Notice of the Second Mortgage. And it was held by Lord Chancellor KING that the Registry of the second Mortgage was not constructive Notice to the first Mortgagee before his

[1] And see the admirable cases of Newman *v.* Chapman, 1823, 2 Randolph, 93, and Turner *v.* Houpt, 1895, 53 N. J. Eq. 526, in which the doctrine is developed and discussed on principle.

Advancement of the latter Sum, for tho' the Statute avoids Deeds not registered as against Purchasers, yet it gives no greater Efficacy to Deeds that are registered than they had before; and the constant Rule of Equity is, that if a *first* Mortgagee lends a further Sum of Money *without* Notice of a second Mortgage, his whole Money shall be paid in the first place.

FROST *v.* BEEKMAN.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1814.

[1 *Johnson's Chancery* 288.]

The Chancellor [KENT].[1]—Another and a more interesting question, is respecting the extent and effect of the registry of the defendant's mortgage, as notice to purchasers. It was a mortgage for 3,000 dollars, and, by mistake, the registry was only for 300 dollars. This mistake is the whole cause of the controversy.

The mortgage act of the sess. 24 ch. 156, declared, among other things, that the registry of a mortgage should contain, not, indeed, the mortgage at large, but the essential parts of the mortgage, and among other specified parts, "the mortgage money, and the time, or times, when payable." To this register all persons whomsoever, at proper seasons, are at liberty to have recourse; and the act declared that mortgages were to have preference, as to each other, according to the times of registry, and that "no mortgage should defeat or prejudice the title of any *bona fide* purchaser, unless the same should have been duly registered, as aforesaid." This registry is notice of the mortgage to all subsequent purchasers and mortgagees; and so the act was construed, and the law declared, by the court of errors, in the case of Johnson *v.* Stagg, 2 Johns. Rep. 510. The English authorities on this point do not, therefore, govern the case. The language of those authorities, undoubtedly, is, that the registry is not notice, though that doctrine is much questioned, and the point seems still to be floating and unsettled. Bedford *v.* Backhouse, 3 Eq. Cas. Abr. 615, pl. 12; Wrightson *v.* Hudson, Ib. 609, p. 7; Morecock *v.* Dickins, Amb. 678; Latouche *v.* Dunsany, 1 Schoale & Lefroy, 157. Sugden, 3d. Lond. ed., 524—7. Com. Dig. tit. 32 Deed, ch. 21. s. 11. The only question with us is, when, and to what extent, is the registry notice? Is it notice of a mortgage unduly registered? or is it notice beyond the contents of the registry?

The true construction of the act appears to be, that the registry is

[1] A part of the opinion of the learned Chancellor dealing with the question of delivery and its essentials is omitted.

Same case on appeal, 18 Johns. 544 (reversed.)

notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage, any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee, and if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. The act, in providing that all persons might have recourse to the registry, intended that as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them, when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase, without hunting out and inspecting the original mortgage, a task of great toil and difficulty. I am satisfied that this was not the intention, as it certainly is not the sound policy, of the statute; nor is it repugnant to the doctrine contained in the books, that notice to a purchaser, of the existence of a lease, is notice of its contents. Taylor *v.* Stibbert, 2 Ves. jun. 437; Hiern *v.* Mill, 13 Ves. jun. 118, 120; Hall *v.* Smith, 14 Ves. jun. 426. In that case, the party is put upon inquiry, and he must make it, or abide the consequences. The decision, in Jackson *v.* Neely, 10 Johns. Rep. 374, was made upon the same principle; and it was held that the recital in a deed of a letter of attorney, by which it was made, was notice to the purchaser of the existence of such a power. But here the statute did not mean to put the party upon further inquiry. The registry was intended to contain, within itself, all the knowledge of the mortgage requisite for the purchaser's safety.

The question does not necessarily arise, in this case, how far the unauthorized registry of a mortgage, as one made, for instance, without any previous legal proof, or acknowledgment, would charge a purchaser with notice of the mortgage. The better opinion, in the books, seems to be, that it would not be notice, and that equity will not interfere in favour of an encumbrancer, when he has not seen that his mortgage was duly registered. Sugden's Law of Vend. 527; 1 Schoale & Lefroy, 157; Hiester *v.* Fortner, 2 Binney, 40. But here everything was done that could have been previously required of the mortgagee. The mortgage was duly presented for registry, and he was not bound to inspect and correct the record. This was the exclusive business and duty of the clerk, and there is no reason why the registry should not operate as notice, to the amount of the sum mentioned therein; and, indeed, so far the obligation of the registry is admitted by the bill.

I conclude, therefore, that the registry was notice to purchasers, to the amount, and only to the amount, of the sum specified in the registry.

We are next led to consider how far relief can be granted to the defendant consistently with these principles.

Whatever claims the defendant may have to favour, arising from the misfortune attending his case, yet it is an established rule, in equity, to give no assistance against a purchaser for a valuable consideration, without notice. Wallwyn *v.* Lee, 9 Ves. 24. He has equal claims upon the equity of the court. But, whenever actual notice of the true sum in the mortgage can be brought home to the purchaser, he is from that time, so far as the former purchase is left incomplete, either as to the deed on the one hand, or as to payments on the other, bound by the prior equitable lien, and all subsequent payments, by him, are made in his own wrong, so far as the rights of the mortgagee are concerned. As soon as notice is received, it arrests all further proceedings towards the completion of the purchase and payment, and, if persisted in, they are held to be done in fraud of the equitable encumbrance. Wigg *v.* Wigg, 1 Atk. 384; Story *v.* Lord Windsor, 2 Atk. 630. Thus, in Tourville *v.* Naish, 3 P. Wms. 306, it was held, that where a man purchases an estate, and pays part, and gives a bond for the residue, notice of an equitable encumbrance, before payment, though after the giving of the bond, was sufficient to stop payment, and to entitle the obligor to relief, in equity, against the bond. Again, in Hardingham *v.* Nicholls, 3 Atk. 304, it was ruled to the same effect, that, if the purchaser for a valuable consideration had not paid the money when notice of the lien was received, though it was secured to be paid, the plea of such a purchase was not good against the plaintiff's title. There can be no doubt as to the rule of equity in this case, and the only difficulty is, to determine from what time the plaintiffs are to be charged with notice of the mistake in the registry of the mortgage.

Frost and M. Goddard are to be treated as *bona fide* purchasers, without notice. It is so averred in the bill, and there is no proof to contradict it. The last deeds from Corl to them, though bearing date in September, 1805, were acknowledged in September, 1806, and are proved by the witnesses on the part of the plaintiffs, (Healy and Taylor), to have been executed in September, 1806. At that time, as Frost avers, they had no notice, in fact, of the registry, though they were chargeable with notice, in law; and when the notice, in fact, not only of the registry, but of the mistake in the registry, came to their knowledge, is left to be inferred from circumstances. They have not thought proper to disclose the precise time, and the obscurity in which this fact is left by the plaintiffs, authorizes the presumption that they may have known it sooner than they are willing to declare. The bill does not state at what time the discovery was made of the registry, but only that, "on such discovery," Frost applied to the defendant, to pay him the 300 dollars, and was then first informed of the mistake. One of the witnesses (Whitney), would lead us to conclude that the first actual knowledge which the parties had of the registry was in September, 1807; and it was in September and November, 1807, as appears by the acknowledgments upon the deeds, that Frost and Martin Goddard sold to the other plain-

tiffs. I think that actual notice of the true mortgage ought to be fixed on Frost and Martin Goddard, as early, at least, as September, 1807. The purchasers from them, who are the other plaintiffs in the bill, make no averment of being *bona fide* purchasers, without notice of the true mortgage. They are perfectly silent on the fact of notice, and the bill is rather equivocal on this point, even as to Frost. He only says, that he and Martin Goddard alienated "without any knowledge or suspicion of any encumbrance, *except the mortgage registered as aforesaid.*" In all cases in which a party sets up his title to relief in equity, as a *bona fide* purchaser, he must deny notice, though it be not charged. 3 P. Wms. 244. n., Bodman *v.* Bon Den Bendy, 1 Vern. 179. It is a general rule in pleading, that whatever is essential to the right of the party, and is necessarily within his knowledge, must be positively and precisely alleged; and the plaintiffs coming in the character of *bona fide* purchasers, were bound to state, affirmatively, the equity of their case; if they will not aver the fact, that they were purchasers without notice, we are not bound to presume it. The fact rests in their own knowledge. In Gerard *v.* Saunders, 2 Ves. jun. 454, the defendant pleaded a purchase for a valuable consideration, without notice; and Lord LOUGHBOROUGH held, that he was bound to deny, fully, and in the most precise terms, every circumstance from whence notice could be inferred.

One of the deeds to Frost, for 200 acres, was dated in 1803, and recorded in 1805, prior to the mortgage; and whatever payments were made upon that purchase before Frost was chargeable with notice of the true mortgage, though made prior to the time of the delivery of the defendant's deed to Corl, ought equally, with subsequent payments, to be protected against any further sum than that contained in the registry of the mortgage. Frost cannot be in a worse situation by paying money before Corl's title was perfected, than if he had paid it immediately after. As a *bona fide* purchaser without notice, and so long as that character is preserved, he is not bound beyond the sum in the registered mortgage; and though no prior transaction between Corl and him could gain a preference over the mortgage as registered, because Corl had no title until the delivery of the deed to him, in consequence of that registry, yet, when the delivery took place, the prior deed to Frost, and the prior record of it, operated, instantly, so as to protect Frost's title *from that time,* and to render him a *bona fide* purchaser, except as to the registered mortgage. It follows, of course, that all prior payments made by him became equally effectual, subject to the same limitation. A contrary rule would work odious injustice.

The subject of the payments requires this further explanation: and payments to the endorsee or assignee of Corl, before notice, are the same as payments to him; and if any part of the debt created by the purchasers, or either of them, has been duly transferred, so as to vest the interest in the assignee; and if either Frost or Goddard, before notice, had changed the debt in the hands of the assignee, by giving new notes or obliga-

tions to the *bona fide* holder, he ought to be allowed for this as payment, because he has extinguished so much of the old debt, and become absolutely bound to the new creditor.[1]

BLADES *v.* BLADES.

In Chancery, before Lord Chancellor King, 1727.

[1 *Equity Cases Abridged* 358, *pl.* 12.]

So in a Case between two Purchasers of Lands in Yorkshire, where the second Purchaser having Notice of the first Purchase, but that it was not registered, went on and Purchased the same Estate and got his Purchase registered; yet it was decreed, that having Notice of the first Purchase, though it was not registered, bound him, and that his getting his own Purchase first registered was a Fraud, the Design of those Acts being only to give Parties Notice, who might otherwise, without such Registry, be in Danger of being imposed on by a prior Purchase or Mortgage, which they are in no Danger of when they have Notice thereof in any Manner, tho' not by the Register.[2]

[1] "The principal question in this case is whether the deed of Stephen Dow, conveyed to the grantee a title which is superior to that of any grantee by a prior unrecorded deed of the grantor. This question was fully considered and discussed in Woodward *v.* Sartwell, 129 Mass. 210. In that case it was held that a deed by an officer, upon a sale or execution of 'all the right, title, and interest, of the judgment debtor in land specifically described in the deed, took precedence of a prior unrecorded deed of the judgment debtor, and conveyed to the purchaser a good title. The court put the decision upon the ground that an attaching creditor has the same standing as a *bona fide* purchaser, and that the deed of the officer 'is equivalent to a conveyance made by the debtor at the time the attachment was made; and in the case at bar, as the record title then stood in the name of the debtor, as to *bona fide* purchasers, he was the owner of the land.'

"We are satisfied that these views are correct. We can see no sound distinction between a deed made by an officer upon a sale on execution, and a deed made by the debtor himself. In either case the deed conveys all the title which the debtor had, and no more; but a prior unrecorded deed has no effect except as to the parties to it, and others having notice of it, and as to creditors and purchasers leaves the title in the grantor. Earle *v.* Fiske, 103 Mass. 491." Per Morton, C.J., in Dow *v.* Whitney, 1888, 147 Mass. 1, 6.

[2] In a valuable case at law, Lord Mansfield said: "But in respect of *voluntary family settlements*, to be sure, notice varies much. In the case of a later statute, 7 Ann. C. 20, though it is said there positively, 'that a registered deed shall take place of an unregistered deed' from whence it might

LE NEVE *v.* LE NEVE.

IN CHANCERY BEFORE LORD CHANCELLOR HARDWICKE, 1747.[1]

[1 *Vesey, Sr.* 64.]

Edward Le Neve in 1718 married his first wife, who then had a considerable fortune; a freehold and personal estate, with more personal estate in expectancy. His father had a leasehold estate which by articles were covenanted in consideration for the marriage, and her personal estate, to be settled on trustees and their heirs for Edward Le Neve for life, then for his intended wife for life, for a jointure if she survived him: after their death, in trust for the issue of the body of Edward by her in such manner as he by deed in life, or by his will should appoint: in default of such issue, to Edward and his heirs.

The marriage was had, and a settlement made in pursuance of the articles; there was issue; the wife died: the only children now

be argued, that if a person knew of an unregistered deed, it should stand against him: Equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside: because he has that notice which the act of Parliament intended he should have.

"I now come to the consideration of the *third* question, 'whether the deed of 1773 is such a deed as is entitled to protection, and ought to set the other aside?'

"In order to do that it should be a *bona fide transaction*, and a *fair purchase*, in the understanding of mankind; or for a *good consideration*, as a settlement upon a marriage, in consideration of the marriage; and then, such a settlement would set aside and take place of a former fraudulent deed. It is not necessary that it should be for money: but it must be a fair bona fide transaction: if it is colorable only it cannot stand." Doe *v.* Rutledge, 1777, Cowp. 705, 712.

And so in Stroud *v.* Lockhart, 1797, 4 Dall. 153, where it appeared that the defendant, Lockhart, knew of the existence of the mortgage at the time of purchase, and said he would pay it, although then unrecorded. The Court in a *per curiam* decision held:

"The case is too plain for argument. The plaintiff must have a verdict; and all the trouble of the jury will be to calculate the interest."

Finally, in Agra Bank, Ltd. *v.* Barry, 1874, 7 H. L. 135, 148, Lord Chancellor CAIRNS said:

"And, my Lords, I take the explanation of those decisions to be that, which was given by Lord KING in the case of Blades *v.* Blades, 1 Eq. C. Ab. pl. 12, p. 358, upward of 150 years ago, the case which was mentioned just now at your Lordships' Bar."

[1] "Lord HARDWICKE, the successor of Lord TALBOT, held the great seal for upwards of twenty years, and the present wise and rational system of English equity jurisprudence owes more to him than perhaps to any of his predecessors. His decisions are reported in the elder Vesey and Atkyns, and partly in Ambler and Dickens: and though none of them are eminent reporters, either

living were the present plaintiffs, a son and a daughter. In 1743 Edward Le Neve married a second wife; but previously entered into articles with her trustees, for settling this very estate on himself for life, then on her for her jointure, and on the issue of that marriage; pursuant to which a settlement was made.

This estate was subject to the Stat. 7 Queen Anne, cap. 20. which requires registry. The first marriage articles and settlement were never registered; the second were. Edward Le Neve also mortgaged this leasehold estate, as absolute owner.

for accuracy or precision in the statements of the cases, or in giving the judgment of the court, yet the value of his opinions, and the great extent of his learning, and the solidity of his judgment, have been sufficiently perceived and understood. There is no judge in the judicial annals of England whose judicial character has received greater and more constant homage. His knowledge of the law, said a very competent judge, was most extraordinary, and he was a consummate master of the profession. His decisions, at this day, and in our own courts, do undoubtedly carry with them a more commanding weight of authority than those of any other judge; and the best editions of the elder Vesey and Atkyns will continue to fix the attention and study of succeeding ages." 1 Kent's Commentaries, 494.

"Among English lawyers his position is unique. With less than the ordinary advantages of education, he proved more than competent in youth for offices which usually tax the powers of mature age. His maturity fulfilled the promise of his prime, and his later career crowned the whole with unperishable lustre. The term of his chief-justiceship was, indeed, too brief and uneventful to afford him an occasion of displaying his qualities to full advantage, but during his prolonged tenure of the great seal they found such scope as had been allowed to none of his predecessors; nor did he fail to turn his opportunity to noble account. It is hardly too much to say that in the course of somewhat less than twenty years he transformed equity from a chaos of precedents into a scientific system. This grand revolution he effected in the quiet, unobtrusive, almost imperceptible manner in which the most durable results are usually achieved. Far from despising precedent, he diligently sought for and followed it whenever practicable. But the use which he made of it was such as the Baconian philosopher makes of the instances positive and negative upon which he founds a generalization. Each case as it came before him he reviewed in the light of all discoverable relevant authorities, and never rested until he had elicited from them an intelligible ground of decision. Where English precedents failed he drew freely upon the learning of the civilians, and, in the last resort, upon his own large and luminous sense of natural justice. Thus in HARDWICKE the rational and architectonic spirit of the Roman jurisprudence penetrated English equity, with the result that in a multitude of intricate questions his decisions have traced the lines within which his successors have undeviatingly proceeded; and close and frequent scrutiny has only served to confirm their authority. His judgments, which in important cases were usually written, were always models of logical arrangement and perspicuous style. Only three of them were ever reviewed by the House of Lords, and in each case the decision was affirmed." Article on Yorke, Philip, first Earl of HARDWICKE, in Dict. Nat'l Biography.

The bill (vide ante, 61). Such notice must, however, be in the same transactions. Fitzgib. 207, 2 Atk. 242; 3 Atk. 294, 392; Barn. Ch. 220, was brought by the children of the first marriage, to have an execution of the trust of the leasehold estate settled thereby; and in order thereto to have the subsequent articles and settlement postponed, though registered: on the foundation of notice to the second wife, or her agent or trustee, of the first articles previous to her marriage, and the execution of the second articles; and to have the leasehold estate disincumbered of the mortgages made in prejudice of the trust: and that the plaintiffs may be let in according to the contingency.

Lord Chancellor, having taken time to consider of the case, now pronounced his decree. The first settlement of this leasehold estate is an odd one, for it is settled as a freehold estate: however that will not affect the question, as it will vest in a proper manner. The plaintiffs admit the law to be against them from the defendant's registering; because the act gives the legal estate where the register has placed it, so that the general question is, whether there is sufficient equity for the plaintiffs to get the better of the legal estate vested in the defendant's trustee, who is a purchaser for valuable consideration? which will depend on the point of notice, and the consequences of it. To determine this, several questions have been considered: first, whether it sufficiently appears, that one Norton was agent or attorney for the second wife? Secondly, whether there is sufficient evidence of notice to him of the first articles; such as will be admitted according to the rules of this court? Thirdly, supposing there is sufficient evidence, whether in equity it will affect the defendant's purchase, and oblige the court to postpone the second articles and settlement to the first; notwithstanding the registry act. 7 Ann. c. 20.

The first question will depend upon the answer of the defendant the second wife; who in general has denied notice of the first articles and settlement; but says, that Norton was not employed for her, but as an attorney for her intended husband; admitting that, he might prepare the articles, she having a confidence in him from her husband's recommendation. So that her general denial must be taken with this admission; which leaves it open to the proof of notice to her agent, although personal notice is denied. It is said, that notice to her husband's attorney or agent will not affect her; but she has sufficiently admitted, that he was agent or attorney for her, by her consenting to his preparing the articles, from a confidence in her husband. So that no matter what ground she went upon, or on whose recommendation or advice; it being the same to the plaintiffs: for it would be very inconvenient and mischievous to take into consideration the recommendation, from whence an agency arose; nor is it material, that the husband also employed him; there being several cases where in marriage settlements the same counsel or attorney are employed on both sides, who would be both affected with notice to him; it being the same to a person having an equity. There are two very

strong cases for this; as Brotherton *v.* Hatt, 2 Vern. 574, where the agent, whose notice affected the party, was employed on both sides, as I take it, and which is very clear authority: next Jennings *v.* Moor, 2 Vern. 609, S. C. acc. Bro. P. C. 278. (oct. ed.) under title "Blenkarne *v.* Jennens." See Maddox *v.* Maddox, ante, 62. post, 2 Vol. 370; Merry *v.* Abney, 1 Ch. Ca. 38; Sheldon *v.* Cox, Amb. 624, where the subsequent approbation of an agent affected the party with notice; though that was going much farther than is necessary to go in the present case. These cases clearly prove it to be not material to the plaintiffs, upon whose recommendation or advice Norton was employed, or that he was employed by both; it being good notice to her, that he was employed by her.

As to the second question: it is objected for the defendant, that notice being denied by her answer, and proved by one witness, it is contrary to the rules of the court to admit it; which is generally true: but that admits of this distinction; where the defendant's answer is a clear denial of a fact, which is proved only by one witness, the court will not decree against the answer. But where it is not a positive denial of the same fact, but admits of a difference, that it is only a denial with respect to herself, whereas in other respects it will equally affect her, there are several cases, where the court on one undoubted witness will decree against the answer (see 1 Vern. 136, 161, post, 97; 2 Atk. 19, 140; 9 Ves. 275; 12 Ves. 278, etc.); then here she denies only personal notice: which is a negative pregnant, that still there may be notice to her agent, and is a fact equally material. Then Norton swears, that a copy of the first article was delivered to him previous to the second, to take counsel's opinion, and that he might have verbal notice before: which is very strong; and the copy was delivered, to see, if they could get the better of this very settlement. So that this is such an evidence of notice, as to be admitted here.

The last question depends on two things: first, whether any notice whatsoever would be sufficient to take away from the defendant a purchaser for valuable consideration, the benefit of the act? Secondly, whether notice to the agent would do so?

The first is of great consequence and extent. The intent of the preamble of the act was to secure subsequent purchasers and mortgagees, against prior secret conveyances, and fraudulent incumbrances; for the last of which there was no occasion to provide. The first means, that a subsequent purchaser having registered, should prevail against a prior secret conveyance, of which he had no notice: but if he had notice of a prior conveyance, for valuable consideration, which was vested properly, that is not a secret conveyance; the act does not say, that a subsequent purchaser shall be affected with no equity whatsoever; therefore, though its manifest operation is to vest the legal estate according to the prior registry; yet it is left open to all equity; for there is no danger to the subsequent purchaser, who might refuse, if he had notice of the prior

good conveyance. This act therefore is properly compared to 27 H. cap. 16. of inrolments or bargains and sales; being much to the same effect, though not in the same words. The meaning of this act was, because before, when uses were in being, any agreement passed the use to the bargainee from the bargainor; which occasioned great mischief; being prejudicial to the crown, intangling purchasers, and overturning the common law as the solemnity of livery: to prevent which it enacted inrolment. But the rule thereon ever since is, that an inrolment by a subsequent bargainee having notice of a prior bargain for valuable consideration, whether by actual agreement to pass immediately or by articles, is not material: for he is equally affected with that notice, as if his conveyance was by feoffment, or lease and release. So that the operation of equity on both those acts is the same, and is reasonable; for it were strange, that a conveyance in such a form should exclude any equity; which would give an opportunity to take advantage of having the legal estate to commit fraud: and to this purpose the cases put for the plaintiffs are material. As suppose a purchaser employs an attorney, takes a conveyance, and pays the money and orders the attorney to register; which he neglects, but purchases it himself and registers it, that would be a ground for relief: so if it had not been his attorney, but one who prevailed with him not to register: or if it was done by one, who was privy to the first transaction, and knew it was not registered. These cases clearly shew, there may be relief against the force of those words, which gave a prior right to the prior registry: which brings it to the consideration of the cases on this head; which are but three. The first is, Lord Forbes *v.* Denniston, 4 Bro. P. C. 189, octavo edit., and S. C. 13 Vin. Ab. 550, and 19 Vin. Ab. 514, which not being rightly understood, shall be mentioned particularly. It arose in Ireland, where a General Register Act, 6 Queen Anne (there is a material difference between the Registers Act for Ireland and those in England. By the Irish act, 6 Ann. c. 2, an absolute priority is expressly given to the instrument first registered. Vide Sch. & Lef. Rep. 98. Et. ibid. 159, 160—The registry of a deed in Ireland is not, of itself, notice, ibid. 90, 157); Lord GRANARD was seised of a large estate, of which he was only a tenant for life by marriage settlement, remainder to his first and every other son in tail, with power to make leases for three lives, or twenty-one years in possession: in 1715, there were tenants, who surrendered and took a new lease from him for three lives at £30 *per ann.* but it was not registered: he becoming indebted came to an agreement with his first son Lord FORBES, who thereby took upon himself to pay his father's debts, and to pay an annuity to him, and another to his wife; in consideration of which the father conveyed his estate for life to trustees for Lord FORBES, but Lord FORBES had no personal transaction in this, the whole being done by one Stewart; who during the treaty had notice of a lease made, and got the last conveyance registered, which the lease was not. The trustees brought an ejectment to recover the estate from the lessees; who brought a bill for relief in the

Chancery there, before Lord Chancellor MIDDLETON; who at first made a declaration, rather than a decree, that the conveyance to the trustees was prepared to destroy the lease, which was not registered; and was therefore fraudulent against the tenants, though done without the intention of the father or son; and recommended it to have the lease established; if not he would give judgment. The parties not agreeing, he decreed it fraudulent, though Stewart alone had notice, and decreed a perpetual injunction against the ejectment. Upon appeal to the Lords here, it was fully considered; and they made a decree 23d February, 1722, which requires explanation: for it is commonly cited as if the judgment were affirmed; whereas it was reversed; not because the Lord Chancellor there went on a wrong principle; but because he made a wrong decree upon that principle; for thereby the lease would be good, though not warranted by the father's power. The Lords therefore reduced it to what was right; giving the tenants full relief against the defect of the registry; quieting the possession during the father's life; and granting an injunction against the judgment in ejectment: but after the father's death left it open to dispute the lease, if not made in pursuance of the power; for after death of the father, who was only tenant for life, the register act was out of the case. The second is the case of Blades *v.* Blades, 1 Eq. Ca. Ab. 358. pl. 2, May 2, 1727, by Lord KING; which is a very material authority. A will not being registered, the heir at law gets into possession, and mortgages to one who registers; and so having the legal estate, and being a purchaser for valuable consideration, insisted that the devisee had no equity, to take from him the benefit of the registry act. But the mortgage was declared fraudulent and set aside, on the foot of the mortgagee's having had notice of the will's not being registered; yet it does not appear in the bill or answers, that there was any charge of actual fraud; the only charge being notice. The third case happening on the registry act is, Chival *v.* Niccols & Hall, 1 Stra. 664, in the Exchequer, December 10, 1725, which is a clear authority for relief against the registry act, on the circumstance of notice: but it is not material to state it, because there was a charge of fraudulent circumstances in the party claiming the benefit of the act; and therefore so far not applicable to the present case. The two other cases went on notice only, and the first on notice to the agent; for the Lord Chancellor excused the father and son from notice of the contrivance. The ground, on which all the cases went, was that taking the real estate after notice of a prior right for valuable consideration was a fraud, and took away the *bona fides* of the second purchaser, and making it *mala fides:* which is agreeable to the definition of fraud in the civil law. Digest, lib. 4 tit. 3 *et fraus nemini patrocinari debet,* 3 Co. Rep. 178b.

This being so on notice in general: the next consideration under this head is, whether notice to the attorney or agent is sufficient; which is a consequence of the former decision. It must be admitted, that some notice would be sufficient, as actual personal notice; and such as in the

cases put for the plaintiff; and fraud in the party being the foundation, it is the same whether in the party himself, or the person employed. These articles were put into Norton's hands, to see if they could get the better of them, and circumvent the issue by the first marriage; to which it is objected for the defendant, that here may be a fraud upon her; for admitting Norton knew of this, it might be done by collusion with the husband to cheat her; which indeed may be true, and has happened in several cases; but ought not the person who trusted and employed him, at whosesoever recommendation, to suffer by this fraud, rather than a stranger? The rule is, that he, who trusts most, must suffer most. This imposition happened in the two cases in Vern. and that of Lord FORBES: and yet they were affected with notice; and otherwise it would overturn several cases determined on notice to agents, and make it very precarious; for agents do frequently use imposition. But this case is stronger; for Norton was not only her agent in the transaction, but her trustee; and there are several cases, where notice to a trustee, who is not barely nominal, being privy to the transaction and accepting the trust, will affect the party: so it will here, and take from the defendant the benefit of the register act.

Then the question is, what decree should be made? It is objected, that the plaintiff's interest under the articles is merely contingent: and it is true, that without issue, it will go to the father, at whose death the will or deed appointing must be known. Yet the plaintiffs are intitled to come here for relief: for a contingent interest is such, as the court will take care for the benefit of the party when it happens.

Decreed that Norton having full notice of the first marriage articles and settlement, the second should be postponed thereto; and the trustees in the second to convey and assign the leasehold estate accordingly, at the expense of the defendant the father: but as to the other defendants the mortgagees, no notice of the first articles being proved on them, the plaintiffs have no right, but on redeeming them for what is due for principal, interest and costs. But the plaintiffs have a clear right to have the leasehold estate disincumbered against these mortgages by the father; and as the court has in several instances given credit to an answer, so as to make it the foundation of an inquiry, let the master inquire what portion or provision the father gave his daughter upon her marriage; for it would be hard to direct a disincumbrance as to her, who had already received a portion. The father to pay costs hitherto; and had not the plaintiffs examined Norton as a witness, they should have costs against him.

Note. The case of Irons *v.* Kidwel, October 29, 1728, was cited by the Attorney-General; where the bill was to set aside a purchase by the defendant, subsequent to the plaintiff's title, which was not registered, whereas the defendant's was: and it was there insisted, that the registry act should not avail the defendant, because he had notice; which notice was only that a bill was filed in Chancery, and that *lis pendens* should

affect the defendant: but Lord KING, though he allowed the general rule of notice, thought it not such a notice as should take away the defendant's benefit of the statute; for that what did affect the party's conscience, would not be ground for equity to relieve.[1]

PLUMB *v.* FLUITT.

IN THE EXCHEQUER, 1791.

[2 *Anstruther* 432.]

It was a bill brought for a sale, in order to obtain payment of two mortgages made by one Basnett of the lands in question, and to restrain the defendant from proceeding at law to recover possession of the premises.

It appeared that about the beginning of the year 1779, Basnett being indebted to Pattison Ellames, and then obtaining a further loan from him, amounting together to the sum of 316l. delivered to him the title-deeds of one of the premises in question, called Massey's Lodge, as a security, and signed a memorandum stating himself to have done so, and binding himself to mortgage the same to Ellames, for his further security, when requested. Being about the same time indebted to the plaintiff Plumb in the sum of 12,000l. he deposited with him the title-deeds of the other premises in question, called Massey's Office, or The Warren, as a security for that sum. The bill also charged an undertaking to complete this security by a mortgage, when required; but no memorandum to that effect was entered into.

About the month of June 1779, Basnett appearing to be in declining circumstances, and then indebted to the defendant Fluitt in 530l. was pressed by him for payment or security of that sum; and accordingly, on the 2d of July in that year, executed to him a mortgage to that amount of both the estates above-mentioned.

The circumstances of this transaction were disputed. The plaintiff endeavoured to fix the defendant with actual notice of the deposits, and for that purpose read the testimony of Basnett, who swore that he had informed the defendant of the deposits of the title-deeds before the execution of the mortgage.

EYRE, Chief Baron.—The legal estate being in the defendants, the question is, whether the plaintiff can raise a trust upon his estate, so as to gain a priority for his own demand?

It is now fully settled, that a deposit of title-deeds, as a security for

[1] Same case is reported at greater length in 3 Atk. 646; 2 White and Tudor's Equity Cases, 7th ed., 175, with elaborate annotations.

a debt, does amount to an equitable mortgage. If the plaintiff can prove actual or constructive notice of the deposit in the defendant, it raises a trust in him to the amount of that equitable mortgage. As to the evidence of actual notice, the testimony of Basnett alone, unsupported and opposed, is too weak to found a decree or even to direct an issue upon it. Swearing to the fraudulent intention of his own deed, he can expect little credit in a Court of Equity.

A great deal has also been said about constructive notice. Constructive notice I take to be in its nature no more than evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted. Thus, if a mortgagee has a deed put into his hands which recites another deed which shews a title in some other person, the Court will presume him to have notice, and will not permit any evidence to disprove it.

The only reason that can raise in this case a notion of constructive notice is, that the deeds were not forthcoming.

But is it possible that this circumstance can, of itself, be notice of the hands into which they are fallen, or the purpose to which they have been applied? At the utmost it can only be a circumstance of evidence, to shew that there was reason for further inquiry; but being unsupported by any other circumstances, it proves nothing.

It is said, no man will advance money upon an estate without seeing the title-deeds, unless with a fraudulent intention.

I wish I saw, in a Court of Equity, some solid distinction established between a consideration which is an old debt, and a sum advanced *de novo;* there certainly is a great difference; in the one case the creditor jumps at every security he can get; he takes the deed of conveyance now, and trusts to getting the title-deed afterwards: but till such a distinction is established, it is difficult to apply the reasoning which would belong to it.

The person who takes the legal estate without the deeds, in a case like this, appears to me, unless there be fraud, to be less blamable than he who takes the deeds without the estate.

Upon all the circumstances, I can see nothing in the case that amounts to constructive notice.

With respect to the general question, the effect of leaving the title-deeds in the hands of the mortgagor, the most intelligible rule, and in my opinion the most agreeable to justice, would have been to say, that if a man takes, as his security for his mortgage, a single deed, and leaves the other deeds in the hands of the mortgagor, so as to enable him to commit a fraud, that he shall, in all such cases, be postponed, without reference to the quantity of pains or diligence which he exercised to obtain the deeds; for whether the pains be more or less, the mischief is the same; and if I found the rule so laid down, I should have been perfectly satisfied. But it has been decided otherwise in the late cases, Beckett *v.* Cordley, Penner *v.* Jemmat, 2 Bro. R. 652, and Tourle *v.* Rand, which

establish the rule that nothing but fraud, or gross and voluntary negligence in leaving the title-deeds, will oust the priority of the legal claimant. As for the case of Goodtitle *v.* Morgan, the mortgagee must always risk there being an outstanding term, in which case the legal estate is out of him. The opinion of Justice BURNETT in Ryal *v.* Rowles, when taken altogether and explained by the context, is not contrary to the rule that is now established.

The case of Mocatta *v.* Murgatroyal is a strong case; but I find no one that goes the length of saying, that a failure of the utmost circumspection shall have the same effect of postponing a mortgagee as if he were guilty of fraud or wilful neglect.

In the present case, all the negligence, or all the activity in the world would have left the defendant in exactly the same situation in which he now is. He took this mortgage as the only security he could get; if it was already mortgaged, he was only where he was before; he seizes it as a plank to save something; for as a second mortgage it was worth something.

The plaintiff having therefore failed in making out his case of fraud, either by actual or constructive notice, and the general proposition not being supported, which, if established, must apply to purchases as well as to mortgages, the bill must be dismissed with costs.[1]

[1] "The plaintiff is to be considered as a *bona fide* purchaser. A conveyance in trust to pay debts is a valid conveyance founded on a good consideration. Stephenson *v.* Hayward, Prec. in Ch. 310. Nor do I think that the plaintiff is chargeable with notice sufficient to postpone the operation of his assignment in trust. All the notice in the case is contained in the schedule to the assignment, stating that the title to the 50 lots is, in the name of the defendant, given as collateral security to pay certain notes. The notice that is to break in upon the registry acts must be such as will, with the attending circumstances, affect the party with fraud; and here is certainly no fraudulent intention to be imputed to the plaintiff. The ground of the numerous decisions on this subject seems to be, the actual fraud of the party in taking a second conveyance with knowledge of the first, and with intent to defeat it. There may possibly be cases, as Lord HARDWICKE observes in Hine *v.* Dodd, 2 Atk. 275, in which the registry acts are set aside upon notice devested of fraud; but then the proof must be extremely clear. In this case, the notice arising from the schedule was lame and defective. There was no notice as to the amount of the notes, or how many, or when payable; whereas every registry of a mortgage must specify, with certainty, the mortgage money, and when payable. The plaintiff in this case might not have inferred from the schedule that the defendant held any thing more than a nominal title, and, perhaps, as a mere trustee upon some extinguished debt. It was not even said to be a subsisting debt. If notice that is to put a party upon inquiry be sufficient to break in upon the policy and the express provisions of the act, then, indeed, the conclusion would be different; but I do not apprehend that the decisions go that length. This would be too slight a foundation to act on in opposition to the statute. Here is no evidence that any possession was ever taken under the mortgage. There was nothing except the loose information in the

GRESS *v.* EVANS ET AL.

IN THE SUPREME COURT OF DAKOTA, 1877.

[1 *Dakota* 387.]

This action was brought to quiet plaintiff's title to certain land set out in detail and to remove a cloud from his title caused by certain deeds executed and delivered to defendants for said land, and which were by them placed on record before the plaintiff's deeds were recorded.[1]

SHANNON, C. J.—As to the title of the plaintiff, Gress, the Judge found "that the chain of title from the general government to plaintiff is complete, and the deed from Byron M. Smith to plaintiff vested in him absolutely the fee-simple title, where it still remains unless it has been divested by the subsequent conveyances to defendants." And as to these, it is further found that "the deeds from Jane L. Titus and Moses S. Titus to Evans, and from Evans to Burbank, were executed and delivered subsequent to, but recorded before the deeds to Smith and from Smith to plaintiff."

And this, from the pleadings themselves, is the substantial paramount point in the whole controversy. The complaint substantially alleges fraudulent designs and intentions on the part of the defendants in procuring and recording their deeds, and charges that before the dates of their deeds they had full, complete, and actual notice of the prior unrecorded deed from the Tituses to Smith. The defendants, in their answers, deny all fraudulent purposes, and assert that they were purchasers in good faith and for a valuable consideration, and had no notice, either actual or constructive, and claim that they should be protected. The defendants having, admittedly, their deeds first duly recorded, the direct and vital issue before the trial court was:—were the defendants purchasers in good faith and for a valuable consideration? Had they notice either actual or constructive?

Upon this issue the findings are, that "the deed from Jane L. and M. S. Titus to Evans, dated May 17th, 1871, as before stated, is in form a quit claim—'by these presents grant, bargain, sell, release, and quit claim . . . all their right, title, interest, claim, or demand. . . .

schedule; and under such an equitable and meritorious assignment as this, I do not deem that sufficient to render the assignment fraudulent in the hands of the plaintiff. Nothing can be stronger than the language of Lord ALVANLEY in Jolland *v.* Stainbridge, 3 Ves. 478. 'The person,' he says, 'who takes subsequently, must know exactly the situation of the prior deed, and have meant to defraud.' All the cases appear to me to turn upon fraud resulting from the notice." Per Chancellor KENT in Dey *v.* Dunham, 1816, 2 Johns. Ch. 182, 189.

[1] A short statement is substituted for the elaborate facts of the report, and of the opinion only a portion is printed relating to question of notice.

To have and to hold the above quit claimed premises . . . so that neither the said party of the first part, their heirs or assigns, shall have any right, title, or interest in and to the aforesaid premises.'" "The second deed to Evans, dated August 11th, 1871, is the same in form, with the exception of the covenants which are as follows: 'and the said party of the first part . . . doth covenant with the said party of the second part . . . that they have not made, done, or executed, or suffered any act or thing whatsoever whereby the above premises, or any part thereof, now are, or at any time hereafter shall or may be imperilled, charged, or incumbered in any manner whatsoever.'"

The next important finding is:—"That Evans was not a purchaser in good faith, but that he obtained his deed by fraud and misrepresentation." And again that "it is disclosed by the evidence that Mr. and Mrs. Titus were induced to make this deed by the representations of Evans that he was the person entitled to it; that he was the owner of the land, but that there was some defect in his title which he wished remedied," etc. And furthermore it is found, that "when he" (Evans) "applied to Mr. Titus for a deed he was told by Titus that *they had sold the scrip, and that they did not claim any right in the land, that they considered the land sold so far as they were concerned.*" To this the Judge immediately adds as follows: "Evans knew he was not the purchaser of the scrip, or his assignee, and he made no inquiry as to who had purchased the scrip, or whether they had previously executed a deed."

There is another finding relative to non-inquiry from Smith, which concludes by stating that Evans "at no time asked him" (Smith) "if he had received a deed, although from previous conversations he must have known that Smith had, or claimed to have, some interest in the land."

But as to the defendant, Evans, there is yet another significant finding, which is as follows: "The evidence clearly establishes the fact that he" (Evans) "paid no consideration whatever. No consideration was mentioned or alluded to. After the deed was executed and delivered, Evans made a present to Mrs. Titus of ten dollars, as he then stated, to compensate them for their trouble. It was neither given nor received as a consideration for the deed. The grantors neither asked nor expected anything, but made the deed to Evans because they supposed him to be the party entitled to it, and for the purpose of curing some defect in his title."

Such are the prominent findings of fact in relation to the defendant, Evans, on the issue of his being a purchaser in good faith and for a valuable consideration. And we must next turn attention to the findings regarding the other defendant, Burbank. As to him, the Judge has found as follows, to-wit: "He" (Burbank) "admits that he was told that Smith had a power of attorney from Titus and husband to locate certain scrip upon the land in controversy, *and might hold a power of attorney to convey said land, or a deed to the same.* It does not appear that he made any effort to find out anything further in relation to the

matter, except to examine the records. He did not inquire of Smith, or attempt to ascertain his address or anything of the kind. It does not even appear that he was ignorant of Smith's whereabouts, or that he might not have readily applied to him for information. He claims to have inquired of others, but their names he does not disclose."

From these findings, the trial court deduced the conclusions that " Burbank cannot stand as a *bona fide* purchaser without notice," and that Evans was in the same position; and that " the equities of this cause are with the plaintiff, and that the deeds to defendants are fraudulent and void as against him." Is there any error in this?

Our Civil Code makes void a conveyance not recorded, only as against a subsequent purchaser of the same property, or any part thereof in good faith and for a valuable consideration. See Civil Code of 1866, § 530; revised Codes, page 341, § 671. Actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge and notice of any facts which would put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser. There should be proof of actual notice of prior title, or prior equities, or circumstances tending to prove such prior rights, which affect the conscience of the subsequent purchaser. Actual notice, of itself, impeaches the subsequent conveyance. Proof of circumstances, short of actual notice, which should put a prudent man upon inquiry, authorizes the Court, or jury, to infer and find actual notice.

Or to express it exactly, good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. And notice is either actual or constructive. Actual notice consists in express information of a fact. Constructive notice is notice imputed by the law to a person not having actual notice; and every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself. Civil Code of 1866, §§ 2007-8-9-10-11; Revised Codes, pages 504-5, §§ 2105-6-7-8-9.

Viewed in the light of this law on the subject, from the findings, clearly the plaintiff's unrecorded conveyances were not void as against Evans; and as the admissions of Burbank are to be taken most strongly against himself, he must be considered as having had notice of circumstances sufficient to put a prudent man upon inquiry, and having omitted to make such inquiry with reasonable diligence, he must be deemed to have had constructive notice of the fact itself.

The learned Judge who tried the issues, arrived at a conclusion of law which in a case like the present, so pregnant with other overshadowing circumstances, it is unnecessary now to examine or determine. He was of opinion that by a deed which (like those to Evans) simply

purports to pass "the right, title, interest, claim, or demand" of the grantor, the grantee does not obtain anything which the grantor had previously parted with, although the subsequent deed was first recorded; that such grantee cannot be regarded as a *bona fide* purchaser without notice; that, therefore, Burbank took nothing under his deed from Evans, as Evans had nothing to convey, and that the terms of the quit claim conveyances to Evans were, of themselves, notice to both Evans and Burbank. Brown *v.* Jackson, 3 Wheaton, 450; Oliver *v.* Platt, 3 How. 396; May *v.* McClair, 11 Wallace, 232; Smith's Heirs *v.* Bank of Mobile, 21 Alabama, 124; Rogers *v.* Burchard, 34 Texas, 441; Bragg *v.* Paulk, 42 Maine, 502; Walker *v.* Lincoln, 45 Maine, 67; Doe *v.* Reed, 5 Ills. 117; Coe *v.* Persons Unknown, 43 Maine, 452; Martin *v.* Brown, 4 Minn. 282; Everett *v.* Ferris, 16 Minn. 26; Marshall *v.* Roberts, 18 Minn. 405. But see Graff *v.* Middleton, 43 Cal. 341; Jackson *v.* Fish, 10 Johns. 456; 3d Wash. on R. P. 314, 417; 33 N. H. 22; 34 Miss. 18; 22 Ver. 104; 5 Iowa, 66; 11 N. H. 74; 23 Texas, 614, and other authorities cited.

It would seem there is much in the authorities quoted, although they are somewhat conflicting, to sustain the positions assumed by him. At all events, whatever the fact may have amounted to, Burbank was cognizant from the records that his grantor had only "the right, title, interest, claim or demand" of *his* grantors, in and to the land.

In SIMMONS CREEK COAL CO. *v.* DORAN (1891), 142 U. S. 417, FULLER, C. J., said: The coal company insists, however, that it occupies the position of a *bona fide* purchaser for value without notice, and as such is entitled to the protection of the court.

None of the original deeds in appellant's chain appear to have been produced on the hearing, though certified copies were attached to the pleadings, but no independent evidence was adduced of the payment by any of the defendants of any money whatever. As against complainant the recitals in these deeds cannot be relied on as proof of the payment of the purchase-money. Boone *v.* Chiles, 10 Pet. 177; Flagg *v.* Mann, 2 Sumner, 486; Kyles *v.* Tait, 6 Gratt. 44; Warren *v.* Syme, 7 West Va. 474; Brown *v.* Welch, 18 Illinois, 343; Lloyd *v.* Lynch, 28 Penn. St. 419.

Apart from this we hold appellant chargeable with notice. The rule is thus stated by the Virginia Court of Appeals, in Burwell's Adm'rs *v.* Fauber, 21 Gratt. 446, 463: "Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat emptor* is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a *bona fide* purchaser. He is bound not only by *actual*, but also by *constructive* notice, which is the same in its effect as actual notice. He must look to the title papers under which he

buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice." Jones *v.* Smith, 1 Hare, 43, 55; Le Neve *v.* Le Neve, 3 Atk. 646; S. C. 1 Ves. Sen. 64; S. C. 2 Leading Cas. Eq. 109, 4th Am. ed.; and Brush *v.* Ware, 15 Pet. 93, 114, are cited.

In Mundy *v.* Vawter, 3 Gratt. 518, relied on by appellant, the registry of a deed of "all the estate both real and personal, to which the said James was in any manner entitled in law or in equity," was held not to be notice in point of law to a subsequent purchaser of the existence of the deed, nor would notice in point of fact of such existence and contents affect such purchaser, unless he had further notice that the land purchased by him was embraced by the provision of the deed; "and the proof of such notice, whether direct or positive, or circumstantial and presumptive, must be such as to affect the conscience of the purchaser, and is not sufficient if it merely puts him upon inquiry, but must be so strong and clear as to fix on him the imputation of *mala fides.*" But the latter branch of this ruling was disapproved of in Warren *v.* Syme, 7 West Va. 474; and in Fidelity Company *v.* Railroad Company, 32 West Va. 244, 259, it is said that "whatever is sufficient to put a person on inquiry is considered as conveying notice; for the law imputes a personal knowledge of a fact, of which the exercise of common prudence might have apprised him. When a subsequent purchaser has actual notice that the property in question is incumbered or affected, he is charged constructively with notice of all the facts and instruments, to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property of which he had notice."

Lord HARDWICKE observed in Le Neve *v.* Le Neve, Amb. 436; 3 Atk. 646; 1 Ves. Sen. 140: "That the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser;" and the notes to that case in 2 Leading Cases in Eq. 109, discuss at length the doctrine of knowledge, actual notice, express or implied, and constructive notice, with abundant citation of authority. The conclusion of the American editor is that actual notice embraces all degrees and grades of evidence, from the most direct and positive proof, to the slightest circumstances from which a jury would be warranted in inferring notice, while constructive notice is a legal inference from established facts, and, like other legal presumptions, does not admit of dispute.

Mr. Justice Story in his work on Equity Jurisprudence, § 399, adopts the language of Chief Baron EYRE, in Plumb *v.* Fluitt, 2 Anstr. 432, 438, that constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent, that the court will not allow even of its being controverted.

In later editions of that work, Judge REDFIELD, 11th ed. § 410, *a*, says that the term constructive notice "is applied, indiscriminately, to such

notice as is not susceptible of being explained or rebutted, and to that which may be. It seems more appropriate to the former kind of notices. It will then include notice by the registry, and notice by *lis pendens*. But such notice as depends upon possession, upon knowledge of an agent, upon facts to put one upon inquiry, and some other similar matters, although often called constructive notice, is rather implied notice, or presumptive notice, subject to be rebutted or explained. Constructive notice is thus a conclusive presumption or a presumption of law, while implied notice is a mere presumption of fact."

Vice-Chancellor WIGRAM in Jones *v.* Smith, *supra,* laid it down that cases in which constructive notice had been established, resolved themselves into two classes; first, those in which the party charged had actual notice that the property in dispute was in some way affected, and the court has thereupon bound him with constructive notice of facts to a knowledge of which he would have been led by an inquiry into the matters affecting the property, of which he had actual notice; and, secondly, those where the court has been satisfied that the party charged had designedly abstained from inquiry for the purpose of avoiding notice. If there is not actual notice that the property is in some way affected so that the case does not fall within the first class, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind or gross and culpable negligence, so as to bring it within the second, then the doctrine of constructive notice would not apply.

Each case must be governed by its own peculiar circumstances, and in that in hand we think appellant either had actual knowledge, or actual notice of such facts and circumstances, as by the exercise of due diligence would have led it to knowledge of complainant's rights, and that if this were not so, then its ignorance was the result of such gross and culpable negligence that it would be equally bound.

Again, actual and unequivocal possession is notice, because it is incumbent on one who is about to purchase real estate to ascertain by whom and in what right it is held or occupied; and the neglect of this duty is one of the defaults which, unexplained, is equivalent to notice. 2 Lead. Cas. Eq. 180; Landes *v.* Brant, 10 How. 348; McLean *v.* Clapp, 141 U. S. 429, 436; French *v.* Loyal Company, 5 Leigh, 627, 641; Western Mining Company *v.* Peytona Coal Company, 8 West. Va. 406, 441; Core *v.* Faupel, 24 West Va. 238; Morrison *v.* Kelley, 22 Illinois, 610. "Possession," said WALKER, J., in the case last cited, "may be actual or constructive; actual, when there is an occupancy, such as the property is capable of, according to its adaptation to use; constructive, as when a person has the paramount title, which, in contemplation of law, draws to and connects it with the possession. But to be adverse it must be a *pedis possessio*, or an actual possession." In Ewing *v.* Burnett, 11 Pet. 41, 53, it was held that neither actual occupancy nor cultivation nor residence necessary to constitute actual possession; that where

the property is so situated as not to admit of any permanent useful improvements, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property he did not claim, such possession will create a bar under the statute of limitations; that what acts may or may not constitute a possession are necessarily varied, and depend to some extent upon the nature, locality and use to which the property may be applied, the situation of the parties, and a variety of circumstances which have necessarily to be taken into consideration in determining the question. And so possession of an improved portion of a tract of land, under a conveyance in fee of the whole, is construed to be co-extensive with the grant. And where a party purchases land adjoining a tract of which he is already in the occupancy, he will be considered as at once, in point of law, in the possession of the newly-acquired tract, when the latter is vacant, or at least not held under an adverse possession.

[1] For further consideration of the question of notice, see the following weighty cases: Rogers *v.* Jones, 1836, 8 N. H. 264, per PARKER, J.; Rorer Iron Co. *v.* Trout & Wife, 1887, 83 Va. 397; Robinson *v.* Crenshaw, 1888, 84 Va. 348.

SECTION 5. ESTOPPEL.[1]

GYNN *v.* EDMONDS.

IN CHANCERY, BEFORE LORD KEEPER COVENTRY, 1625-40.[2]

[*Nelson's Chancery* 28.]

Rowland Owen being seised in fee of the premises in question, made a lease thereof to the defendant Edmonds for 21 years, and afterwards granted the reversion to the plaintiff Gynn. The term expired, but Edmonds refused to deliver the possession, alledging that before Rowland Owen had any estate or interest in the premises, one Owen ap. John was seised thereof in fee, and made a lease to the said Edmonds for 21 years, and afterwards granted the revision to one Griffith Edmonds, brother to the defendant, who released his right to the defendant, and affirmed that the first lease made by Rowland Owen was only to prevent suits at law which might arise, for that after the said release Griffith Edmonds had delivered the deed, viz., the grant of the reversion, to the said Rowland Owen, who was heir at law to Owen ap. John, the grantor, and that the acceptance of the lease from Rowland Owen ought only to be an estoppel during the term. But it appearing to the Court, that Griffith Edmonds,

[1] In Morgan *v.* Railroad Co., 1877, 96 U. S. 716, 720, Mr. Justice SWAYNE uttered a happy epigram which states the law and its reason in a single sentence. "It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent."

The following cases at law are fundamental statements of the doctrine. Pickering *v.* Bush, 1812, 15 East 45; Pickard *v.* Sears, 1837, 6 A. & E. 469; Freeman *v.* Cooke, 1848, 2 Ex. 654, per Baron PARKE; Cornish *v.* Abington, 1859, 4 Hurl. & N. 549; See more especially Horn *v.* Cole, 1868, 51 N. H. 287, where Chief Justice PERLEY discusses the doctrine in a masterly way and enumerates the authorities. For detailed treatment of the law see 2 Pomeroy's Equity Jurisprudence, 3d ed., §§ 801-821; Bigelow's Estoppel, 5th ed., 556-672; Ewart's Exposition of the Principles of Estoppel by Misrepresentation.

[2] Lord HARDWICKE has stated that Lord Keeper COVENTRY was "very able and contributed a great deal towards modelling the Court of Chancery." (Letter to Lord KAMES in Parke's Chancery 508.)

And another and later Lord Chancellor, while criticising his politics, says: "As an Equity Judge, he seems to have given entire satisfaction. He certainly must have been familiarly acquainted with the law of England, and with the doctrines and practice of the Court of Chancery." (2 Campbell's Lives of the Chancellors, ch. LXII.)

the grantee of the reversion, and under whom the defendant claimed by vertue of the said release, had made a feoffment of the premises to the plaintiff Gwynn, Anno 7 Jac., which was executed by Livery and Seisin, and to which the defendant Edmonds was a witness, and for that the defendant's title by the release was never set on foot until the lease was expired. Therefore the possession was decreed to Gwynn and his heirs, according to the grant of the reversion to him by Rowland Owen as aforesaid.

HOBBS *v.* NORTON.

IN CHANCERY, BEFORE LORD KEEPER NORTH, 1683.

[1 *Vernon* 136.]

Sir George Norton's younger brother having an annuity of £100 per annum, charged on lands by his father's will, contracts with Mr. Hobbs for selling to him this annuity. Mr. Hobbs goes to Sir George Norton and tells him he was about to buy this annuity of his younger brother, and desired to know of him, if his younger brother had a good title to it, and whether his father was seized in fee at the time of the making the will, and whether the will was ever revoked; Sir George Norton told him, he believed his brother had a good title to it, and that he had paid him this annuity these twenty years, but withal told him, that he heard there was a settlement made of his father's lands before the will; and that the said settlement was in Sir Timothy Baldwin's hands, and that he had never seen it, and therefore could not tell him what the contents of it were, but encouraged him to proceed in his purchase telling him, he had not only paid his brother his annuity to that time, but had paid to his sisters £3000 under the same will. Afterwards Sir George Norton gets this settlement into his hands, and would avoid this annuity, the lands being thereby entailed. Hobbs's bill was to have this annuity decreed, or repayment of his purchase money.

The cause coming on to be heard, there was no proof that Sir George Norton, at the time he encouraged Hobbs to proceed in this purchase, had any notice of this settlement. But one witness swore, that Sir George promised to confirm the annuity to Hobbs: but that being but by one witness, and contrary to Sir George Norton's answer, was looked upon as no evidence. It not being probable that Sir George should agree to confirm this annuity, for then he would have been made a party to the deed.

Lord Keeper decreed the payment of the annuity, purely on the encouragement Sir George gave Hobbs to proceed in his purchase, and that it was a negligent thing in him not to inform himself of his own

title, that thereby he might have informed the purchaser of it, when he came to enquire of him: and therefore decreed Sir George to confirm the annuity to Hobbs.

But as to the case between Sir George and his younger brother, that might admit of another consideration, being it was in proof in the cause, that the younger brother all along was knowing of this settlement, and therefore possibly he should not have taken advantage of drawing in a stranger to purchase his title: but the cause between them not being ready for hearing, was left to come on, as it could, by the course of the court.[1]

HUNSDEN *v.* CHEYNEY.

IN CHANCERY, BEFORE THE LORDS COMMISSIONERS, 1690.

[2 *Vernon* 150.]

The mother to whom a term was limited in tail, stands by at a treaty of a marriage, intended to be had betwixt her son and the plaintiff's mother, and hears her son upon that marriage declare, that the term was to come to him after the death of his mother, and is a witness to the deed, whereby the son took upon him to settle the reversion of the term expectant on his mother's decease, on the issue of that marriage, and did not mention or insist she had more than an estate for life therein: the bill was brought by the son of that marriage, complaining that his grandmother, notwithstanding the premises, gave out she *was tenant in tail of the term,* and could dispose of the term at her pleasure, and threatened to alien it, and prayed the benefit of the marriage-settlement, and that the defendant might be compelled to make it good, as to the reversion of the term after her decease.

[1] In Storrs *v.* Barker, 1822, 6 Johns Ch. 166, 170, the learned Chancellor KENT says, that Dyer *v.* Dyer, 2 Ch. Cas. 108, is the earliest case on this point. The principal case arose about the same time. In referring to the latter, the Chancellor says: "The facts in this case are so exceedingly analogous to those in Dyer *v.* Dyer, that one is strongly induced to think it must be the same, under different names, and which, as we have seen, had been directed a short time before, to stand over. Be this as it may, it appears that Lord Chancellor NOTTINGHAM gave no decision on the question, whether ignorance of a man's legal right will protect him against the consequences of encouraging others to deal with his property as their own. The first authoritative decision on this point was made by Lord Keeper NORTH, who succeeded to the great seal in January, 1683, as Lord NOTTINGHAM'S successor."

See also in Tilton *v.* Nelson, 1857, 27 Barb. 595; Smith *v.* Cramer, 1874, 39 Iowa 413; and note in 10 Am. Dec. 328-329.

And though it was insisted on for the defendant, that she was not guilty of any fraud or ill practice, but was ignorant of her title, and knew not that she, as being tenant in tail of a term, might dispose of it, and was no party to the marriage agreement, or concerned in it, and that it might rather be presumed, that she was imposed upon by her son and made to believe that she had but an estate for life, when she had in truth the ownership of the whole term in her. Yet the court decreed it for the plaintiff.

And as a like case cited the case of Dr. Amyas, who stood by and suffered a purchaser to go on without disclosing of his title, and the case between Charles Clare and the Earl of Bedford, who only witnessed a deed, and told the money lent at his master's chamber, being his clerk, and for that alone had his own security postponed.[1]

DRAPER & AL. *v.* BORLACE, IVE & AL.

IN CHANCERY, 1699.

[2 *Vernon* 370.]

Draper, Naylor and Hill having lent Borlace £8,000, Naylor £3,000, Draper £3,000 and Hill £2,000 on a mortgage in fee of his manor of Treludro, and on a statute of £16,000 penalty, as a farther security; the said Hill being a counsellor of Lincoln's-Inn, was afterwards advised with by Mr. Ive, in lending £2,000 to Borlace on a mortgage of the manor of Gargoll, being a lease for three lives held of the Bishop of Exeter; Mr. Hill encouraged Ive's lending of the money, drew the mortgage, and therein was a covenant that the estate was free from incumbrances, making no mention of the statute. Treludro being supposed to be deficient, the question was, whether Hill should be admitted to take advantage of the statute, to lessen Ive's security upon Gargoll.

Per Cur. If he who only conceals his incumbrance shall be postponed, much more ought Mr. Hill, who was intrusted as counsel by the mortgagee, and encouraged the lending of the money, and drew the deed with covenant that the estate was free from incumbrances, and decreed that Ive should be satisfied his £2,000 out of Gargoll before Hill should charge the same with his statute.

[1] Vide Hobbs *v.* Norton, ante 1 vol. 136; Mocatta *v.* Murgatroyd, 1 P. Wms. 394, and cases cited in note (1) there.—Reporter's Note.

HUNING *v.* FERRERS.

IN THE COURT OF CHANCERY, 1712.

[*Gilbert's Equity Reports* 85.[1]]

The Plaintiff having a lease of certain Mills for 12 Years, which were near expired, the Lessor, upon his Marriage, makes a Settlement of those Mills to the Use of himself for Life, then to the first and other Sons of that Marriage in Tail Male, Remainder to his own right Heirs; afterwards the Plaintiff takes a new Lease of these Mills from the Father for 30 Years, and lays 2800l. in new Building, and improving them. The Defendant was the eldest Son of the Issue Male of the Lessor, and during the Time the Plaintiff was making the Improvements, went to his Father, and told him, he had not Power to make any such Lease; that after his Death, the Estate would be his, but never acquainted the Plaintiff with that, or of the Settlement made on his Father's Marriage; but on the contrary, writ to the Plaintiff to take Care to keep one of his Mills in particular in Repair; then the Father dies, and the Son recovers in Ejectment against the Lessee, who thereupon brought this Bill to be quieted in the Possession of the Mills, during the Residue of his Lease, for that the Defendant was fully acquainted with the Circumstances of this Lease, and knew his Father had not Power to make it, and yet never forbid or cautioned the Plaintiff from going on with the Repairs, but on the contrary, stood by, and encouraged him in the Proceeding therein; and so the Plaintiff had a Decree to hold, during the Residue of his Term; for though the Defendant was not Privy to the making of this Lease, but that was only the Fraud of the Father, yet he being to have the Estate after his Father's Death, and taking Notice thereof to his Father, and that he had not such Power to make any such Lease, and yet suffering the Plaintiff to go in the Repairs thereof, with a Design to reap the whole Benefit thereof when his Father was dead, was such a Fraud and Practice in him, as ought to be discountenanced in this Court. For *Qui tacit consentire videtur;* and *Qui potest and debet vetare jubet.* And it was decreed, that the Plaintiff should enjoy, during the Residue of his Lease. See 2 Lev. 152. Edlin *v.* Battaley in Chancery.[2]

[1] S. C. in 1 Eq. Cas. Abr. 356, is reported as Hanning *v.* Ferrers.

[2] For a case similarly circumstanced see Wendell *v.* Van Rensselaer, 1815, 1 Johns. Ch. 344, in which Chancellor KENT discussed the question in the light of reason and authority.

See the admirable case of Storrs *v.* Barker, 1822, 6 Johns. Ch. 166, in which the same learned Chancellor held, citing the authorities, that a person having the legal title, who acquiesces in the sale of the land by another claiming or having color of title to it, is estopped from asserting his title against a purchaser; especially if he has advised and encouraged the parties to such sale to deal with each other.

TEASDALE *v.* TEASDALE.

IN CHANCERY, BEFORE LORD CHANCELLOR KING, 1726.

[*Select Cases in Chancery* 59.]

A son who was only tenant for life, tho' by the father looked on to be tenant in fee, makes a settlement on his intended wife for her jointure, (in which was a covenant), with the knowledge and consent of his father, who was a witness to the deed; he saluted and wished the intended bride joy. The marriage was had; the son dies, and makes his wife executrix, leaving a personal estate of the value of £3,000. The father, after the decease of the son, discovers that the son was only tenant for life, and that the fee was in himself; on which title he had verdict, and judgment at law. The wife of the son brings bill to be relieved.

For the plaintiff it was said, that a multitude of cases have been adjudged, that where a party is privy to the transaction, he shall take no advantage of it; for it is a fraud, and would be doing an innocent person an injury. 1 Vern. 136. Hobbs *v.* Norton; and in Lord MACCLESFIELD'S time, Watt *v.* Creswell, a purchase relieved against a mortgagee who appeared to be privy to the purchase, tho' he was an infant.

Econtra it was insisted, that this case was very different from the cases cited; for there they appear to have been cognisant of their titles, and concealed them, but here he did not know of his title, and therefore cannot be said to conceal it; and further in this case it appears that the father had another estate, which he knew he had in fee, for the settling of which he had an adequate consideration; so extremely plain he would have so done in respect of this, had he known his own title.

Lord Chancellor:

I shall make no difference, whether he knew of his title or not at that time, considering the near relation of father and son; it is plain, it was thought the son had the fee; and had it been known it was in the father, it would have been insisted on that he should have joined, else the marriage would not have been had; as he knew of the settlement, he shall not take advantage against it.

Then it was insisted, that she should be obliged to have recourse to the covenant against the personal estate; and that it would be very hard to make a person suffer for ignorance of his title, when she may have ample satisfaction against the personal estate; whereby equal justice will be done, and she will have the fruit of her agreement.

But the Chancellor said he would compleat her jointure, for that was what was intended to be had, and would not oblige her to have recourse to the covenant.

N. B. By the settlement the husband was made tenant for life, and the wife tenant in tail, which the court would not decree, but ordered an usual jointure to be made on her; *viz.*, an estate for life, impeachable of waste.[1]

BURROWES *v.* LOCK.

IN CHANCERY, 1805.

[10 *Vesey* 470.]

Edward Cartwright, being entitled under a Will to the ninth part of the residue of the testator's personal estate, the whole of which had been distributed, except an outstanding debt, and being pressed by the Plaintiff for a debt due to him in his trade, as a baker, in consideration of 132l. executed an assignment to the Plaintiff of his share of what remained due on account of the residue, amounting to 288l. The expence of the transaction, amounting to 10l., was also paid by the Plaintiff. Previously to this assignment the Plaintiff consulted Lock, the trustee of the fund; who represented Cartwright as being entitled to the full sum of 288l.; though he had ten years before created an incumbrance to the extent of a tenth part of the fund by an assignment to his brother.

Under these circumstances the bill was filed against Cartwright, and Lock, who admitted notice of the prior incumbrance, when he made the representation to the Plaintiff; alleging as an excuse, that he forgot the circumstance.

[1] In Tongne's Lessee *v.* Nutwell, 1861, 17 Md. 212, 230, the court said: "It is insisted that, 'when one stands by and sees another laying out money and making large investments upon property, to which he or she has some claim or title, and does not give notice of it, he cannot afterwards, in equity and good conscience, set up such claim or title.' This language is quoted from Chief Justice SHAW, in the case of Gray *v.* Bartlett, 20 Pick. Rep. 193, where he further says, 'We think this is a very just and well settled principle when well understood and properly applied. The principle insisted on requires some qualifications, and can only be held to apply against one who claims under some trust, lien or other right, not equally open and apparent to the parties, and in favor of one who would be deceived or misled by such want of notice. But where the act of one is an encroachment on the soil or rights of another, an acknowledged *tort*, equally well known or equally open to the notice of both parties, it gives no right until it has continued for such length of time, without interruption, as to found the presumption of a grant, or give effect to the limitation of the right of action for the disturbance, as determined by the common law or by statute.'

"We regard this a sound illustration of an *estoppel in pais*, and are sustained in the adoption of it by this court in the case of Casey's Lessee *v.* Inloes, *et al.*, 1 Gill. 502, where the case in 20 Pickering is quoted with approbation."

The Master of the Rolls [Sir WILLIAM GRANT.[1]] The only remaining question is that with respect to the trustee. It is objected on his part, that this is a demand for damages: also, that this was not a wilful misrepresentation. As to the first point the demand is properly made in equity; and the Lord Chancellor in Evans *v.* Bicknell, Ante. Vol. 6, 174, declared that the case of Pasley *v.* Freeman, 3 Term Rep. 51, and all others of that class were more fit for a Court of Equity than a Court of Law: but his Lordship was clearly of opinion, that at least there is a concurrent jurisdiction; and says, "It has occurred to me, that that case upon the principles of many decisions in this Court might have been maintained here; for it is a very old head of equity; that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false."

In this case the Plaintiff was going to deal with Cartwright upon a matter of interest; and applied to the person, best qualified to give information, the trustee, to know, what Cartwright was entitled to; who told the Plaintiff expressly, that Cartwright was entitled to 288l.; and had an undoubted right to make an assignment to that extent; knowing, that he had not a right to make such assignment; having previously agreed to give another person 10l. per cent. out of the fund. There is therefore a concurrence of all the circumstances, which the Lord Chancellor thinks requisite to raise the equity. The excuse alleged by the trustee is, that, though he had received information of the fact, he did not at that time recollect it. But what can the Plaintiff do to make out a case of this kind, but shew, 1st, that the fact, as represented, is false; 2dly, that the person, making the representation, had a knowledge of a fact, contrary to it, Ante Vol. 7, 182-183. The Plaintiff cannot dive into the secret recesses of his heart: so as to know, whether he did or did not recollect the fact; and it is no excuse to say, he did not recollect it. At least it was gross negligence to take upon him to aver positively and distinctly, that Cartwright was entitled to the whole fund, without giving himself the trouble to recollect, whether the fact was so or not; without thinking upon the subject. This is a much stronger case than Hobbs *v.* Norton, 1 Vern. 136, and the negligence infinitely greater.

Lock therefore must be answerable, in case Cartwright cannot answer the demand; and must first pay over to the Plaintiff the residue of the trust fund, deducting the 10l. per cent.; then Cartwright must make up the deficiency; and, if he fails, Lock must make it good. But under the circumstance of undervalue I will not give costs against Cartwright.

[1] Questions of proper execution and attestation of wills omitted as is also the valuable statement of this truly learned and correct judge as to inadequacy on pp. 174-5.

MARVEL *v.* ORTLIP, SWINDLE AND OTHERS.

IN THE COURT OF CHANCERY OF DELAWARE, BEFORE CHANCELLOR BATES, 1866.

[3 *Delaware Chancery* 9.]

On November 7th, 1865, Ortlip agreed to sell and Swindle to buy certain real estate belonging to the former, upon which was the Washington Hotel. The agreement to sell was in writing under seal, and by the terms thereof the conveyance and possession was to take place March 25th, 1866.

The complainant was an innkeeper and tenant of the Washington Hotel for the past two years. On or about November 7th he was informed by Ortlip of the agreement to sell and assured that if the sale failed, he should remain as tenant at rental of $500. About December 25th complainant received one notice from Ortlip to quit at the end of his term, and on February 15th, 1866, the complainant leased the premises from the equitable owner Swindle for one year beginning March 25th for the rental of $500.

The contract of sale was not executed as contemplated by the parties, and Ortlip brought forcible entry and detainer against Marvel, who thereupon prayed an injunction setting forth that Ortlip and Swindle were estopped to deny lease; second, complainant should not be compelled to pay rent until it be adjudged who was entitled thereto, being induced by their joint acts, and the legal title being in dispute under an existing contract executory and part performer, and third that the complainant was entitled to the specific performance of the lease.[1]

The Chancellor [BATES]: I proceed now to the other ground of equity relied upon in the bill. It is this:—that Ortlip, both by acts and declarations, induced Marvel to believe that Swindle had the power to lease the hotel so as to give the tenant a right of possession after the 25th of March; that under this belief, so induced, and relying upon the acts and declarations of Ortlip, Marvel took the lease and paid in advance part of the rent, and that thereupon Ortlip is equitably estopped from impeaching the validity of the lease as against Marvel.

It was upon this ground of equity that the injunction was ordered. I thought then and still think that the bill charges facts sufficient to estop Ortlip from disturbing the possession of Marvel under this lease. It charges that Ortlip had frequently declared "that Swindle had a perfect right to rent, sell or do what he pleased with the said hotel property in Newark and that he, Ortlip, had the same rights and powers in relation to the farm," and in a subsequent part of the bill he charges

[1] Shortened statement of the case is substituted and only the opinion of the learned Chancellor is given on the point of estoppel.

that, being induced by and relying upon these declarations made to himself as well as others, as also by certain public acts and dealings of Ortlip and Swindle with the proprietors, which were, at least, in harmony with these declarations and gave them force, he took the lease and paid his money; and under the charges of the bill Marvel does not appear to have been then cognizant of the contract or its terms. A clearer case of equitable estoppel than that here charged it is difficult to put. The rule is this:—where one by his acts, declarations or silence, where it is his duty to speak, has induced another person, in reasonable reliance on such acts or declarations, to enter into a transaction, he shall not, to the prejudice of the person so misled, impeach the transaction. He need not have acted fraudulently, or willfully have misled the other party. The object of the rule is not to punish for fraud or falsehood, but to adjust equitably a loss between two parties one of whom must bear it, and it is considered that he should bear it who has caused it. This is a most beneficent principle, for it enforces good faith and gives security to that trustfulness which must enter much into business transactions and it applies itself not to any special class or sort of cases, but to all dealings between man and man. But it must be observed that equity applies this principle of estoppel cautiously and only in a case clear upon the circumstances, because in doing so it interferes with what otherwise is to the party an admitted legal remedy. Hence, it is required that the matter of estoppel, *i. e.,* the facts out of which it arises, be clearly established in evidence: and then the facts so established must present these two requisites, viz:

1. That the party claiming the estoppel was misled and induced to enter into the transaction upon the faith of the declaration, act or silence of the other, or upon the fact or relation which he seeks to restrain the other party from denying.

2. That his being so misled was not through his own negligence, or want of attention to proper means of information. For the general maxim, *"Vigilantibus non dormientibus leges adjuvant,"* ought specially to apply here, since the interposition of equity in these cases is extraordinary and restrictive of legal rights, and will not be extended to those who have not exercised reasonable diligence to protect themselves.

It is not necessary to refer to cases, to show the rule or its limitations. The subject is a familiar one. It is fully treated in 2 Smith's Leading Cases, 400, etc.

Returning now to the case before us.

Although, upon the charges of the bill, a ground of estoppel is shewn, I find it sufficiently denied by the answer and not sustained by affidavits against the answer and must therefore dissolve the injunction.

The estoppel is charged by the bill to arise from both declarations of Ortlip and the acts and dealings of Ortlip and Swindle together. What the acts and dealings of these parties were, are the offers for

sale and the leasing of the properties with the attendant circumstances. These taken in connection with declarations made by Ortlip to Marvel, such as are charged, would have weight on the question of estoppel, because they would give force and probability to the declarations; but considered by themselves without any declarations on the part of Ortlip to Marvel and considering them as impressions on one cognizant, as Marvel was, of the contract, they are not sufficient to estop Ortlip from claiming his right, as the legal owner to the possession of the hotel. And for this clear reason; equity in applying this doctrine interferes with the legal remedy of the party and with what but for the estoppel, is his clear legal right. It is a serious interposition. To warrant it the matter of estoppel should be plainly made out, the facts well established and their effect or construction conclusive, at least not doubtful. The present is a clear case for the necessity of this caution. The vendor is to be debarred from the possession of his property before he receives the consideration for it, under the effect of a lease, which, by the omission of Swindle to give notice to quit, may be one of indefinite duration, and he is turned over to his remedy against Swindle, a species of remedy always undesirable and under the circumstances of this case very embarrassing. An estoppel working such effects should be conclusively established.

Now the acts and dealings of Ortlip and Swindle as facts are established and so notorious that Marvel must have been cognizant of them, and to one ignorant of the contract they would have caused the impression of ordinary absolute ownership. But to one cognizant of the contract and its terms, as was Marvel, these acts were inconclusive, that is, we cannot say that by such acts alone one, cognizant of the contract, was reasonably induced to believe that Ortlip had conferred on Swindle an absolute right to dispose of the possession after the 25th of March. The acts were as naturally referable to the readiness of the purchaser to anticipate and treat as certain the execution of the contract. This has already been fully considered in another connection. One cognizant of the contract, and about to deal with the purchaser, should be reasonably held to inquire beyond such acts as these for the authority of the purchaser to sell or lease the property absolutely, and the omission to do so would deprive him of an equity to this extraordinary relief. I have assumed as a decisive feature, in considering the effect of these acts, that Marvel knew of this contract.

It appears by the complainant's affidavits that he was present at the signing of the contract between Ortlip and Swindle, and must have been cognizant of its terms. Armstrong states that this contract was made in a room at the hotel, that Marvel came from the room for the hotel books and took them into the room, that Marvel, Ortlip and Swindle returned together from this room, where the contract was made, into the bar room, and a conversation ensued which shewed that the contract had then been concluded.

I have considered the acts and dealings of Ortlip and Swindle with the properties and their effect separately, because, although in the bill they are charged in connection with declarations of Ortlip, yet, as the case is now presented, they stand alone. The charge of the bill that there were declarations of Ortlip inducing Marvel to take the lease is fully denied by the answer. The denial I have already quoted. The affidavits prove no such declarations. There is but one transaction shewn which has been relied upon as having the force of such a declaration. It is the conversation between Swindle and Marvel, in Ortlip's presence, in which Swindle promised Marvel the tenancy if he should not sell the property, and engaged Marvel to fill the ice house, which Marvel agreed to do and did. Ortlip was present and must be taken, on the evidence, to have heard it, but said nothing. Now it is true, that silence, when there is an obligation to deny certain facts or relations, upon the faith of which another party is about to act, and the omission to deny which must be supposed to have influenced the party to act, is equivalent to an affirmation of these facts or relations, and may thus work an estoppel. But it must appear that the party claiming the benefit of the estoppel did act upon the faith of the supposed facts or relations, that the party to be estopped was bound to interpose—that, but for such interposition, he would not have become involved in the transaction. These are tests so plainly equitable that no authority for them need be cited.

They will be found implied if not always expressed in all general statements of the doctrine. Let us apply them to the transaction in question. Did Marvel in this conversation agree at all to become Swindle's tenant, so that he could have been held? The testimony does not shew on this occasion more than a proposal by Swindle, not a bargain. What Marvel did afterward as to refilling the ice-house in January does not seem material to the effect of the conversation on the 7th of November, and Ortlip's duty then. Again, supposing Marvel had then accepted the proposed tenancy, could we say that, being cognizant of the contract and knowing that Swindle was but a purchaser under an unexecuted contract, he did not accept the tenancy, as Swindle offered it in mere reliance upon the certainty of the contract being executed? Can we suppose on the other hand from anything that occurred, that Marvel believed that Swindle could put him in possession on the 25th of March, whether he got the title from Ortlip or not? And if he did so believe, was it not his own mistake as to the legal rights of parties under the contract? Had not Ortlip, if he heard the proposal, reason to believe that it was made and received upon the assumed certainty that the contract would be executed? There being no reason then to doubt this certainty, whence arose this obligation to suggest a doubt? Had Ortlip any reason from the circumstances to imagine that Marvel supposed Swindle could put him in possession on the 25th of

March, without the execution of the contract of purchase? If not, whence this obligation to interpose?

I have found it impossible to answer these and similar questions, so as to involve Ortlip in any breach of duty by his silence on that occasion, and without a breach of duty, silence does not work an estoppel. Indeed I can see nothing in the whole transaction but the natural result of the confidence all must be supposed to have felt that the contract would be duly executed on the 25th of March.

It only remains to add on this subject that it does not appear that Ortlip was present when Marvel took the written lease, or at all cognizant of it or of any other conversations or transactions connected with Marvel's tenancy.

LOW *v.* BOUVERIE.

IN THE COURT OF APPEAL, CHANCERY DIVISION, 1891.

[*Law Reports, 3 Chancery Division,* 82.]

Bouverie, being entitled under a settlement to a life interest in a trust fund, applied to the Plaintiff for a loan on the security of such life interest, at the same time referring the Plaintiff to the Defendant, one of the trustees of the settlement, for information as to his, Bouverie's, means and position. The Plaintiff thereupon wrote to the Defendant inquiring what the trust fund consisted of, and whether Bouverie's life interest was subject to any incumbrances, but not stating that Bouverie had applied for an advance. The Defendant replied that the life interest was subject to certain incumbrances, mentioning them, but did not say there were no others. The Plaintiff then made an advance to Bouverie on the security of a mortgage by Bouverie of his life interest. Subsequently the Plaintiff discovered that the life interest was subject to several incumbrances prior to his own, besides those the Defendant had mentioned, but the existence of which, as was admitted by the Plaintiff, the Defendant had forgotten when replying to the Plaintiff's inquiries, though he had had notice of them. The Plaintiff's security being insufficient, he brought an action against the Defendant to have him declared liable for the amount due on the security, alleging that the advance to Bouverie was made upon the faith of the Defendant's written representations.

From a decision of NORTH, J., holding the defendant liable, an appeal was taken.[1]

[1] This statement of the case is taken from the headnote, and the opinion of BOWEN, L. J., is omitted.

LINDLEY, L.J.[1] (after stating the facts and reading the correspondence, continued):—

This appeal raises several extremely important questions. First, is it necessary to consider what are the duties of trustees towards persons about to deal with their *cestuis que trust,* and who, before dealing with them, made inquiries of their trustees as to any assignments or incumbrances known to them.

In Browne *v.* Savage, 4 Drew. 635, 639, Vice-Chancellor KINDERSLEY said that trustees "must, for their own security, give correct information, when inquiry is made of them, whether they have had notice of any prior assignments affecting their trust property." Mr. Lewin, in his well-known work Lewin on Trusts, 8th Ed. p. 704, refers to that case as an authority for the proposition that trustees are bound to answer such inquiries. But when this opinion is examined it can scarcely be supported, and if such a doctrine were logically carried out it would impose very serious duties upon trustees. The duty of a trustee is properly to preserve the trust fund, to pay the income and the *corpus* to those who are entitled to them respectively, and to give all his *cestuis que trust,* on demand, information with respect to the mode in which the trust fund has been dealt with, and where it is. But it is no part of the duty of a trustee to tell his *cestui que trust* what incumbrances the latter has created, nor which of his incumbrances have given notice of their respective charges. It is no part of the duty of a trustee to assist his *cestui que trust* in selling or mortgaging his beneficial interest and in squandering or anticipating his fortune; and it is clear that a person who proposes to buy or lend money on it has no greater rights than the *cestui que trust* himself. There is no trust or other relation between a trustee and a stranger about to deal with a *cestui que trust,* and although probably such a person in making inquiries may be regarded as authorized by the *cestui que trust* to make them, this view of the

[1] In speaking of Lord LINDLEY'S retirement from the bench, after thirty years of distinguished service, Sir Frederick POLLOCK says:

"Lord LINDLEY has given us an almost unique example in our time of the highest distinction in the profession being attained by purely professional merit and without any kind of aid from political influence or claims on any party in the State.

"We are sure that but few of us could say offhand what Lord LINDLEY'S political opinions are; we doubt whether he has ever given any one the right to speak of them in public. Not that we can object to political promotions when they happen, as in the case of at least one of Lord LINDLEY'S colleagues, to light on exactly the right man. Still, Lord LINDLEY'S way is the most excellent from a lawyer's point of view. The younger generation may be reminded that his first published work was of a severely theoretical character. Traces of it may be found in his standard treatises on Partnership and Companies. 'That young man will never get business' was probably the comment, half a century ago, of any rule-of-thumb practitioner who cast an eye on the 'Introduction to the Study of Jurisprudence.'"—22 Law Quarterly Review, 3.

stranger's position will not give him a right to information which the *cestui que trust* himself is not entitled to demand. The trustee, therefore, is, in my opinion, under no obligation to answer such an inquiry. He can refer the person making it to the *cestui que trust* himself.

I will next take the case of a trustee who answers the inquiry. What in this case is the extent of his obligation? Is he bound to find out the facts—bound to make inquiries of his co-trustees, or of the solicitor to the trust? Or is his obligation limited to giving such information as he himself can give without inquiry or research? I am not aware of any principle or authority which imposes upon him any obligation to do more than to give an honest answer to the inquiry—that is to say, to do more than answer to the best of his actual knowledge and belief. He may, no doubt, undertake a greater responsibility; he may bind himself by a warranty, or he may so express himself as to be estopped from afterwards denying the truth of what he said; but unless he does one or the other, I do not know on what principle consistent with Derry *v.* Peek, 14 App. Cas. 337, he can, if he answer honestly, expose himself to liability. I say, "consistent with Derry *v.* Peek," because, until that case was decided, it was generally supposed to be settled in Equity that liability was incurred by a person who carelessly, although honestly, made a false representation to another about to deal in a matter of business upon the faith of such representation. Burrowes *v.* Lock, 10 Ves. 470; Slim *v.* Croucher, 1 D. F. & J. 518, 525. This general proposition is, however, quite inconsistent with Derry *v.* Peek. I do not, however, understand Derry *v.* Peek to apply where there is a legal obligation on the part of the defendant towards the plaintiff to give him correct information. If such an obligation exists, an action for damages will, I apprehend, lie for its non-performance, even in the absence of fraud. See *per* Lord DENMAN in Barley *v.* Walford, 9 Q. B. 197, 208. It is for this reason that I have examined the obligation of trustees to answer inquiries made by persons about to deal with their *cestuis que trust*. There is no equitable, as distinguished from legal, obligation to answer such inquiries, and if a trustee gives an honest answer he discharges the only obligation which he is under.

Again, Derry *v.* Peek, 14 App. Cas. 337, does not in any way affect the law relating to warranties, unless it be by negativing the notion that promoters who issue a prospectus impliedly warrant the truth of the statements contained in it. Nor does Derry *v.* Peek in any way effect the law relating to estoppel where such law is applicable. But estoppel is not a cause of action—it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself. Lord HERSCHELL, in his judgment in Derry *v.* Peek, did not profess to overrule Burrowes *v.* Lock, 10 Ves. 470, and Slim *v.* Croucher, 1 D. F. & J. 518, and it was strenuously contended that those cases were still law, and that they governed the present case. It becomes necessary, therefore, to examine those cases with care.

Burrowes *v.* Lock, as appears from the Registrar's book, was a suit by the assignee of one of several residuary legatees for his share of the residue of a testator's estate. The amount of the residue was not in controversy, and a general administration decree was not sought. The defendants to the suit were the plaintiff's assignor and the trustee of his share of the residue. The trustee had (as appears from the report in Vesey) informed the plaintiff that this share was unincumbered, whereas, in fact, it was not. The decree was, in effect, that the trustee should pay the full amount of the share to the plaintiff without deducting the incumbrance. The trustee, even if he acted honestly, which is, perhaps, questionable, was clearly estopped from denying that the share was unincumbered. This decision was in 1805, more than thirty years before Pickard *v.* Sears, 6 Ad. & E. 474, and at a time when the doctrine of estoppel was less accurately defined than it has since become. Regarded as a decision on the ground of estoppel, Burrowes *v.* Lock appears to me not only to have been quite right, but to remain wholly untouched by Derry *v.* Peek. Lord BLACKBURN seems to have thought that the representation in Burrowes *v.* Lock was scarcely distinguishable from a warranty: Brownlie *v.* Campbell, 5 App. Cas. 953; and if this be the proper view to take of it, Burrowes *v.* Lock, 10 Ves. 470, can stand on that ground, although I confess my own inability to sustain it on the ground of warranty.

Slim *v.* Croucher, 1 D. F. & J. 518, in which Burrowes *v.* Lock was recognized and extended, cannot, in my opinion, be supported on the ground of estoppel. Slim *v.* Croucher was a suit in equity to recover money advanced on a lease granted by the defendant to the borrower, and which the defendant had told the plaintiff would be granted. The lease proved to be invalid. Unless the defendant's statement amounted to a warranty that the lease when granted would be valid, I do not myself see how to avoid the conclusion that Slim *v.* Croucher is inconsistent with, and therefore overruled by, Derry *v.* Peek. 14 App. Cas. 337. Lord HERSCHELL, in his judgment, did not himself examine these cases, but intimated that the two might stand together upon the grounds explained by Lord SELBORNE in Brownlie *v.* Campbell, 5 App. Cas. 936. I am not, however, myself able to reconcile those grounds with the decision in Derry *v.* Peek. Slim *v.* Croucher evidently proceeded upon the notion, sanctioned by the high authority of Lord CAMPBELL, that in that case an action for damages might have been maintained at law upon the defendant's representation, and that in such a case the Court of Chancery had a concurrent jurisdiction with the Courts of Common Law. There would be no such jurisdiction in the case of a warranty. Slim *v.* Croucher was not decided, nor did Lord SELBORNE approve it, on any such ground.

The only conclusion I can arrive at is, that while Burrowes *v.* Lock can be supported and taken as a guide on the ground of estoppel or possibly fraud, Slim *v.* Croucher cannot any longer be regarded as having been

rightly decided, fraud having been negatived. As pointed out by Lord BLACKBURN in Brownlie *v.* Campbell, 5 App. Cas. 953, the line between fraud and warranty is often very narrow, and the same observation is true of the line between warranty and estoppel. Narrow, however, as the line often is, the three words denote fundamentally different legal conceptions which must not be confounded.

Reverting now to the grounds of liability on which this action may be supported, it is obvious that as regards warranty, the Plaintiff and the Defendant were not contracting parties. There was no intention to contract, nor was there any consideration which is essential for the purpose of treating what the Defendant said as a promise or a warranty. As regards estoppel, if the Defendant had said that there were no incumbrances on Admiral Bouverie's life interest except those mentioned by the Defendant in his letters, the case would be clearly one of estoppel; it would be undistinguishable from Burrowes *v.* Lock, 10 Ves. 470; and the Plaintiff would be entitled to relief, not to damages for a misrepresentation, but to an order on the Defendant as trustee for the Plaintiff to pay to him the Admiral's life interest in the fund in question, subject only to the incumbrances disclosed by the Defendant. This is not the relief sought by the Plaintiff, nor is it the relief given to him by the Court below, but it is relief to which he would be entitled on the ground of estoppel. But the difficulty of affording the Plaintiff relief on this ground arises from the ambiguity of the Defendant's letters. They are quite consistent with the view that the incumbrances mentioned by the Defendant were all he knew of or remembered. A statement, however, to that effect would not estop him from shewing that there were others which he did not know of or did not remember. But then it is said that he ought to have known of them and remembered them, as notice of them had been given to him; and it is admitted that if he had looked into the deeds and documents relating to the trust, he would have found that there were other incumbrances besides those which he did in fact know of and did accordingly mention. Knowledge and means of knowledge are very different things; and if a person truly says he only knows or remembers so and so, is it right to treat him as saying that he knows more, even if it is his duty to inform himself accurately before he speaks? I do not think that so to hold would be consistent with Derry *v.* Peek, 14 App. Cas. 337. To treat him in the case supposed as saying more than he did, would be to resuscitate the doctrine condemned in Derry *v.* Peek, and to hold him liable in damages for a negligent misrepresentation.

But then it is said that the Defendant's language was such as to be calculated to mislead, and as in fact to mislead, the Plaintiff's solicitors, who applied to the Defendant for information; and reliance is placed on the judgment of Baron PARKE in Freeman *v.* Cooke, 2 Ex. 654, and of the present Master of the Rolls in Carr *v.* London and North-Western Railway Company, Law Rep. 10 C. P. 307. But the answer to this argu-

ment is, that the Plaintiff too hastily inferred from the Defendant's letters that there were no other incumbrances besides those which he mentioned. He never said this in terms; I cannot think he means to be so understood; and although the Plaintiff's solicitors may have so understood him, I do not think they had more reason to be satisfied with his last letter than with his first, which they saw was too loosely expressed to justify them in acting upon it. It must be remembered that in this case the Defendant was not the only trustee, and it does not appear that the Plaintiff's advisers applied to the other trustee. It is often said that notice to one trustee is notice to all: Browne *v.* Savage, 4 Drew. 635; but this is one of those misleading generalities against which it is necessary to be on one's guard. An incumbrancer of a trust fund who first gives notice to any of its trustees obtains priority over any prior incumbrancer who has given no notice to any of them; but notice to one does not affect the other trustees so as to make them liable for what they may do in ignorance of the notice to their co-trustee. There is no law which precludes them from saying they do not know what he knows; and notice given to one who dies or retires without communicating it to his co-trustee cannot, I apprehend, render them liable for not giving effect to a notice of which they know absolutely nothing: see on the subject, Phipps *v.* Lovegrove, Law Rep. 16 Eq. 80. The doctrine of implied notice cannot create an estoppel in such a case any more than it can create a personal liability.

Fraud, breach of duty, warranty, estoppel, being therefore all negatived in the present case, no ground remains on which this action can be supported.

The appeal, therefore, must be allowed, with costs here and below.

KAY, L.J. In the discussion in this case, the question was raised whether Courts of Equity have been in the habit of exercising a more extensive jurisdiction than Courts of Law in cases of innocent misrepresentation.

The Plaintiff, being about to deal with an equitable tenant for life under a settlement by lending him money upon the security of his life interest, caused inquiries to be made of the Defendant, who is one of the trustees of that settlement, whether the life estate was incumbered. If the Defendant had given a positive answer that it was not incumbered, and the intending lender, relying upon that assurance, had proceeded to lend money upon a mortgage of the life interest, and had afterwards taken proceedings against the trustee to realize his security, there seems to be no doubt that the trustee could not defend himself by saying that the life estate had been previously assigned, but that when he made the statement he had forgotten that fact. Also, where there is conscious deceit, there is no doubt Equity would give relief.

In 1699, in Draper *v.* Borlace, 2 Vern. 369, one who had encouraged another to lend money on mortgage, concealing a prior charge of his own, was postponed.

In 1801, in Evans *v.* Bicknell, 6 Ves. 174, Lord ELDON said, 6 Ves. 183: "It is a very old head of Equity, that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false."

Knowledge of the falsehood, of course, makes the misrepresentation fraudulent, and in cases of fraud Courts of Equity have always exercised a wide jurisdiction.

The facts in Evans *v.* Bicknell were that one Stansell, having a life interest in certain real estate in remainder after the death of his wife, with a possible reversion in fee in default of children, obtained the title-deeds from Bicknell, one of the trustees, and, concealing the settlement, mortgaged the estate in fee to the plaintiff, who filed the bill against the trustee, alleging that he had delivered the deeds to Stansell for the purpose of enabling him to make the mortgage. Lord ELDON said, *ibid.* 182: "The question then is, supposing the husband's interest insufficient to satisfy the mortgage, whether there is a personal demand against Bicknell upon the circumstances of his conduct; and whether, if there is, it can be enforced in a Court of Equity." Relief was refused because the evidence of fraud was not sufficient.

In 1805, in Burrowes *v.* Lock, 10 Ves. 470, a trustee was held liable to the plaintiff who had bought the interest of a *cestui que trust,* relying upon the statement of the trustee that the *cestui que trust* was entitled to the fund, the trustee having forgotten that he had received notice of a first incumbrance. The language of Sir WILLIAM GRANT seems to make it doubtful whether he entirely believed that the trustee had forgotten—if he had not, of course, his statement would be fraudulent.

But it is quite plain that fraud is not necessary in all cases as a ground for this relief.

In 1682, in Hobbs *v.* Norton, 1 Vern. 136, relief was given against the owner of land who answered an inquiry as to an annuity, supposed to be charged upon the land, that he believed it was so charged, and encouraged the applicant to proceed in his purchase of the annuity. The landowner was compelled to pay the annuity, though he had since discovered that he was entitled to the land free from any such charge.

In 1690, in Hunsden *v.* Cheyney, 2 Vern. 149, a mother, who was entitled to a term of years in land which was limited to her in tail, stood by while her son negotiated a marriage upon the footing that he was entitled to the term upon her death, and engaged to settle such reversion on the issue of the marriage. On the suit of a child of that marriage she was compelled to make the settlement good, though it was insisted that she was not guilty of any fraud or ill practice, but was ignorant that as tenant in tail she could dispose of the term.

In each of these cases the plaintiff relied either upon the fraud of

the defendant or upon his being estopped from defending himself by denying the truth of his own statement.

In Slim *v.* Croucher, 1 D. F. & J. 518, where a person, being asked to lend upon the security of a lease which the borrower represented that he was entitled to have granted to him, applied to the lessor and received from him an assurance that he was agreeable to grant a peppercorn lease of the property in question to the borrower. In fact, he had already granted the lease and the borrower had mortgaged it; but the lessor had forgotten the previous grant. The money having been advanced on the faith of this statement, the Court of Appeal, consisting of Lord CAMPBELL, L.C., and KNIGHT BRUCE and TURNER, L. JJ., directed the lessor to repay the money advanced, with interest and costs of suit, recognising in distinct terms that there was no moral fraud on the part of the lessor.

That case carries the doctrine as far as any that can be cited, because at that time Courts of Equity were not accustomed to give relief by way of damages in cases which did not involve actual fraud. Lord CAMPBELL said, however, that it belonged to a class of cases over which Courts of Law and Courts of Equity had a common jurisdiction; and the relief was granted on the authority of the *dicta* of Lord ELDON in Evans *v.* Bicknell, 6 Ves. 174, and upon the ground that the plaintiff was to be placed as far as possible in the position he was in before the representation was made. According to the recent decision in the House of Lords in Derry *v.* Peek, 14 App. Cas. 337, an action of deceit could not have been maintained under such circumstances, because there was not actual fraud. The doctrine of estoppel seems scarcely applicable. The representation relied on in Slim *v.* Croucher, 1 D. F. & J. 518, was more like a contract or promise than the statement of an existing fact. The lessor said he was agreeable to grant the lease. But as the money was not advanced at the lessor's request, there seems to have been no consideration to support a contract. However, the language used by the lessor involved a representation that he was in a position to grant the lease, and this may have been the misrepresentation relied on. If the mortgagee could sue the landlord to compel him to grant the lease or, in the alternative, for damages, and the landlord were estopped from denying his ability to make the grant, he might be treated as contumaciously refusing to do so, and in this way perhaps the decision might be justified. But this would be an action for specific performance of a contract, and I do not see how it could be maintained. Lord Justice TURNER says distinctly that enforcing a personal demand against the Defendant under such circumstances is an old jurisdiction of the Court of Equity, and refers to Lord ELDON's language in Evans *v.* Bicknell, 6 Ves. 182, which, however, as I have pointed out, was a case of fraud. Lord CAMPBELL evidently felt the difficulty, for in his judgment he seems to distinguish the case from an action for damages, because there could be no question about the amount to be recovered.

In Piggott *v.* Stratton, 1 D. F. & J. 33, a vendor induced a man to buy land for building by a statement that he was lessee of the adjoining land, and could not, owing to the terms of his lease, build upon it so as to obstruct the sea-view from the land he was selling. After the plaintiff had built, the vendor surrendered his lease and took a new one not containing any restriction against obstructing the view, and then commenced to build so as to obstruct the view from the plaintiff's houses. It was held by the same Court that decided Slim *v.* Croucher, 1 D. F. & J. 518, that the vendor must be restrained from so doing, Lord CAMPBELL, C.J., sustaining the injunction expressly on the ground of estoppel. "I apprehend," he says, ibid. 49, "that the injunction is to be supported on the well-established doctrine, that if A. deliberately makes an assertion to B., intending it to be acted upon by B., and it is acted upon by B., A. is estopped from saying that it was not true. If it turns out to be false, A. is answerable for the damage which may have accrued to B. from having acted upon it, and B. is entitled, in respect of anything done in the belief that it was true, to object to any denial of its truth by A. This doctrine is to be found in Pickard *v.* Sears, 6 Ad. & E. 469, and a series of subsequent decisions."

Lord CAMPBELL's language in both these cases, but more especially in the former, might be read as intimating an opinion that an action at law would lie for an innocent misrepresentation of fact upon which another person acted. But Piggot *v.* Stratton was an obvious case of estoppel.

It has been recognised since Freeman *v.* Cooke, 2 Ex. 654, that a statement made by a man with the intention that it should be acted upon, and which is acted upon accordingly, is binding upon him, so that he is precluded from contesting its truth although it was not fraudulently made, and this has been followed in numerous instances. The doctrine was stated by Lord BLACKBURN in the House of Lords, in the well-known case of Burkinshaw *v.* Nicolls, 3 App. Cas. 1004, 1026, in these words: "When a person makes to another the representation 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action."

Certificates in that case had been issued by a joint stock company for shares which the certificates stated had been fully paid up, and the company were held to be estopped from denying that they were paid up, as against a purchaser of those shares for value without notice. The same doctrine was applied in *In re* Bahia and San Francisco Railway Company, Law Rep. 3 Q. B. 584, and in Hart *v.* Frontino and Bolivia South American Gold Mining Company, ibid. 5 Ex. 111, where no kind of fraud was imputed to the companies.

The result of the authorities seems to be as follows:—

1. There has been from ancient time a jurisdiction in Courts of Equity in certain cases to enforce a personal demand against one who made an untrue representation upon which he knew that the person to whom it was made intended to act, if such person did act upon the faith of it and suffered loss by so acting.

2. This was readily done where the representation was fraudulently made, in which case an action of deceit would lie at law.

3. Relief will also be given at Law and in Equity, even though the representation was innocently made without fraud, in all cases where the suit will be effective if the defendant is estopped from denying the truth of his representation.

4. Where there is no estoppel, an innocent misrepresentation will not support an action at law for damages occasioned thereby.

5. Estoppel is effective where an action must succeed or fail if the Defendant or Plaintiff is prevented from disputing a particular fact alleged: for example, if an assign of A. sues A.'s trustee to recover the fund assigned, and the trustee is prevented from denying its existence in his hands; or at law, if the assign of a debt should sue the alleged debtor and he was prevented from denying that the debt was due. Or, in the converse case, an estoppel may be a defence; as if a joint stock company were to sue a shareholder for calls and they were estopped from denying that the shares were paid up, their action would fail.

It is obvious that this rule does not apply to an action for deceit. In such an action the Plaintiff relies, not on the truth of the statement, but upon its falsehood; and he is bound to prove, not only that the representation was untrue, but also that it was made fraudulently. Derry *v.* Peek, 14 App. Cas. 337, very well illustrates the difference. It was an action by a person who had been induced to take shares in a joint stock company by an untrue statement in a prospectus. The action was not against the company, but against the directors who had issued the prospectus. The representation was not fraudulently made. Preventing the defendants from denying the truth of their representation would not enable the Plaintiff to succeed in such an action; so that the Plaintiff could not rely on estoppel. That could only be if the defence had been that the statement was inaccurate, and the Defendants were estopped from denying the accuracy of their own statement. The Plaintiff's case was not that the statement must be treated as accurate: on that supposition he could not have had any relief against the Defendants. The Plaintiff sued the Defendants upon the ground that the statement was false, and false to their knowledge—that is, fraudulent; and the defence that prevailed was that, if it was inaccurate, it was not fraudulent.

6. I am not satisfied that relief in the nature of a personal demand against the defendant has been given in Equity in cases which did not involve fraud or to which this doctrine of estoppel would not apply. Slim *v.* Croucher, 1 D. F. & J. 518, is the only instance I know of; and, as

Lord CAMPBELL said that there might be relief at law in that case, he probably considered, either that it was a case of estoppel, or that an action of deceit would lie—which latter view is not considered with Derry *v.* Peek, 14 App. Cas. 337.

In the present case the doctrine of estoppel would enable the Plaintiff to succeed if the facts warrant the application of it. But in order to create an estoppel, the statement by which the Defendant is held bound must be clear and unambiguous. This is an ancient rule as to estoppel by statements in a deed, as appears from Rolle's Abr.: "Estoppel," (P) pl. 1 and 7, and was acted on by Lord CAIRNS in Heath *v.* Crealock, Law Rep. 10 Ch. 22. In General Finance, Mortgage, and Discount Company *v.* Liberator Permanent Benefit Building Society, 10 Ch. D. 15; 27 W. R. 210, Sir G. JESSEL followed the last case, and intimated that, in his opinion, the doctrine ought not to be extended, there being no reason for preferring one innocent purchaser to another. That certainty of statement is also required to maintain an estoppel upon a statement not by deed, appears from Freeman *v.* Cooke, 2 Ex. 654, where relief was refused upon the ground that no reasonable man would have acted on the faith of the statements made if they were taken altogether.

Whether this suit be treated as in Equity or at Law, the essence of the plaintiff's case must be satisfied of this. If there was fraud, and the statement was intended to mislead, its ambiguity would not be a defence; but where no fraud is alleged, it is essential to shew that the statement was of such a nature that it would have misled any reasonable man, and that the Plaintiff was in fact misled by it.

One peculiarity of the present case is that there is no evidence. The cause is tried upon admissions by both sides. Consequently we have no statement by the Plaintiff or by his professional advisers, who were the real actors in the negotiations, as to what meaning they attributed to the letters on which they now rely as a misrepresentation; nor is there any statement or admission as to the extent of the reliance which they placed upon the alleged misrepresentation. The Court has to determine what the representation amounted to, and how far it influenced the Plaintiff's conduct. The Plaintiff did not personally interfere in the negotiations. His solicitors having been applied to by Vice-Admiral Bouverie, the equitable tenant for life, for a loan upon the security of his life interest, and having, as appears from the first letter, been assured by him that he had not mortgaged or in any way parted with such life interest, wrote the letters which have already been read by Lord Justice LINDLEY.

It was pointed out by Lord Justice BOWEN in the argument, that the last letter but one demonstrated that the writers, the Plaintiff's solicitors, considered they had not obtained at that time a satisfactory answer to the question stated in it. The reply was on the 27th of February. Without further inquiry the Plaintiff lent money to Vice-Admiral Bouverie upon the security of a mortgage of his life interest, and the Plaintiff admits

that the Defendant did not, at the time of his correspondence, recollect that he had received, as he now admits was the fact, notice of, or that he was otherwise aware of, the existence of previous mortgages on the life estate. It appears that nothing can be recovered from the tenant for life, who is an undischarged bankrupt, and is out of the jurisdiction.

Now, what is the true inference from these facts? Did this correspondence amount to a statement by the Defendant that there were no other incumbrances upon the life estate than those mentioned in his letters? Or was the true meaning that those were all that he knew of or remembered at the time?

It is said that we should adopt the former view, because otherwise it is not probable that the money would have been advanced; but I am not convinced of that.

The Plaintiff's solicitor had the assurance of Vice-Admiral Bouverie that he had not incumbered, and they might well have been satisfied with the statement of the trustee in adition that he did not know of any incumbrance. Such a statement made in good faith, if accurate, would not render the Defendant liable.

I am strongly disinclined, in a case which is free from any suspicion of fraud, to hold a person in the position of this Defendant liable upon a statement which is not clear and unambiguous. I cannot believe that solicitors receiving such letters as those written by this Defendant could possibly read them as a positive assurance that there were no other incumbrances. I think that the only fair meaning which they could attribute to the statements of the Defendant was that the charges he mentioned were all that he was aware of at the time he was writing.

For this reason, I think that the appeal should be allowed and the action dismissed.

SAVAGE *v.* FOSTER.

IN CHANCERY, BEFORE LORD CHANCELLOR MACCLESFIELD, 1723.

[9 *Modern* 35.]

Margaret Smith being seised of the lands in question, upon her marriage with Peter Flavill settled the same upon trustees and their heirs, to the use of said Peter Flavill for life, then upon Margaret his intended wife for life; remainder, after the death of the said Peter and Margaret, to the heirs of the said Peter, on the body of the said Margaret to be begotten; remainder to the right heirs of the said Margaret for ever. The said Peter and Margaret had issue only one daughter, the now defendant, who was married to one Foster.—Peter Flavill died, and then his widow married one Brown, by whom she had issue one other daughter,

and no more; which daughter being courted by one Williams, but he refusing to marry her without such a fortune, which Margaret her mother was not able to give without breaking through this settlement, conveyed the said lands to the aforesaid Williams, &c.; and the defendant, Mrs. Foster, and her husband, who knew that the lands were settled on her in tail as aforesaid, solicited her mother Margaret Brown to make a conveyance in favour of the said Williams, and were assisting in carrying on the marriage between him and her half-sister Brown. Whereupon the said Margaret conveyed these lands &c., to the use of herself for life, remainder to Williams and his heirs; then the marriage took effect; and afterwards Williams sold these lands to the plaintiff Savage, who entered and built an house thereon.

And now Mrs. Foster, who was the issue in tail by virtue of the said settlement, and endeavouring to set it up against the title of the plaintiff, who was the purchaser, he exhibited a bill against her to have his title established against that settlement; for that she having full notice of the purchase, and of her own title, she gave no notice thereof to the plaintiff, and therefore ought not to be at liberty now to impeach it, though she was a *feme covert,* but that she should be concluded by this fact as well as if she was an infant.

It was argued for the defendant Mrs. Foster, that two things are necessary to bind the right in cases of this nature: the one is, that the party must know his own title to the lands; and the other is, that he must be instrumental in promoting the purchase thereof by the vendee, without giving him notice of such title; for it would be of dangerous consequence if the bare permission of him to proceed in the purchase should be a foundation to bind his right in this court on the foot of fraud. It is true, the defendant knew she had a title under this settlement, but she apprehended she was not to take till after her mother's death; she knew likewise that her sister was about to marry Williams, but did not know upon what terms; but if she had known the terms of that marriage, she was then a *feme covert,* and her husband ought to have given the plaintiff notice of her title; therefore his negligence shall not prejudice her, who had done nothing to lose her inheritance and the entire benefit of this settlement for ever.

On the other side it was first denied, that the two things beforementioned by the plaintiff's Counsel are necessary to have relief in cases of this nature; the one, that the party should know his own title; and the other, that he should be instrumental in carrying on the purchase by another, without giving him notice of such title. It is true, he ought to know his own title, and that must necessarily be intended in this case, because the defendant had the custody of this deed of settlement; but it is not necessary that the person interested should be active or instrumental in carrying on the agreement in order to a purchase; for if the party knew his own title, there can be no danger that his right should be bound by the purchase, because it was in his

power to help himself, by giving the purchaser notice of such right; and thought this defendant was a *feme covert,* yet it was a fraud in her not to give the purchaser notice of her right; and therefore it shall be bound for ever; and the rather, because the defendant solicited her mother to make this conveyance in favour of Williams, upon the marriage of her sister, and for that the plaintiff hath entered and built on the lands.

THE COURT. Where there is a parol agreement made for a lease, and the lessee, by virtue of such agreement, enters and builds, this Court will establish it on the foot of fraud in the lessor, notwithstanding the Statute of Frauds, &c.; because contracts executed in part are not always within the statute, though executory contracts are.

Now this bill is brought to be relieved against a fraud in the defendant, who would avoid the plaintiff's title by an elder settlement, though she was privy to, and assisting in, carrying on the marriage of him under whom the plaintiff claims, and never gave any notice of her title to the purchaser.

Now when anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser. And in such case infancy or coverture shall be no excuse; for though the law prescribes formal conveyances and assurances for the sales and contracts of infants and *feme coverts,* which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no laches in him, this Court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase; neither is it necessary, that such *infant* or *feme covert* should be active in promoting the purchase, if it appears, that they were so privy to it that it could not be done without their knowledge.

Therefore it was decreed, that the defendant should levy a fine to the plaintiff to extinguish her right to the lands in this settlement, and that the plaintiff should have a perpetual injunction to quiet his possession; and that if the defendant shall levy the fine quietly, and without delay, then the plaintiff shall have no costs, otherwise he shall pay costs. And the case of Watts *v.* Cresswell, 9 Viner Abr. 415, was now remembered, where tenant for life borrowed money, and his son, who was the next in remainder, and an infant, was a witness to the deed of mortgage; this Court gave relief on the foot of fraud, because the infant did not give the mortgagee notice of his title. So in the case of

one Clere, Clere *v.* Earl of Bedford, 13 Viner Abr. 536, who was an infant, and clerk to an attorney, and had a mortgage on his master's estate, and engrossed a subsequent mortgage thereof to another, without giving notice that the estate was mortgaged before to him; and for that reason his mortgage was postponed on the foot of fraud.[1]

Nota. In the next sessions of parliament, the defendant petitioned to appeal, or to have a rehearing at the peril of costs, and offered to levy a fine on that condition; but it was rejected for not coming in time.

ROSS *v.* SINGLETON.

IN THE COURT OF CHANCERY OF DELAWARE, BEFORE CHANCELLOR RIDGLEY, 1821.

[1 *Delaware Chancery,* 149.]

In the year 1785, certain real estate, situated in New Castle County, being held by Joseph Singleton and his wife, the defendant, in her right, Singleton's interest therein was sold in execution of a judgment against him, and purchased by Daniel Thompson and Andrew McIntire. Afterwards the title under the Sheriff's sale came to Thompson solely. Joseph Singleton, about the year 1791, enlisted as a soldier in the troops commanded by General St. Clair, and was in the battle fought by General St. Clair with the Indians on the 4th of November, 1791. The rumor of his death gained circulation and general credit with his family and in the neighborhood. The defendant, his wife, soon afterward applied to the complainant to purchase the land from her, and assured him that she had made the most particular inquiries after Singleton and had obtained such information as fully convinced her that he had been killed in the battle with the Indians. The complainant at that time declined the purchase; but upon her renewing the application afterwards, with an offer to sell the land at fifty shillings per acre, he agreed to purchase, confiding in her assurance that she had reason to believe that Singleton, her husband, was dead. A contract in writing was drawn and signed, dated 1st of December, 1794, whereby the defendant agreed to sell and the complainant to buy the land, being sixty-one acres and eighty perches, at fifty shillings per acre, amounting to £153.15; of which £56.05 was to be paid down, and

[1] That an infant who is privy to or practices a fraud shall be bound in the same manner as if he had been adult, see Evroy *v.* Nicholas, 2 Eq. Abr. 489; Becket *v.* Corley, 1 Brown's C. C. 353; Harvey *v.* Astley, 3 Atk. 607; but it seems, that this rule is confined to such acts as are voidable only, Sanderson *v.* Marr, 1 H. Bl. Rep. 75.—Reporter's note.

the residue when a good title should be made and the possession delivered. A memorandum, appended to the contract, referred more particularly to the title as being in the defendant by descent from her father, and that Joseph Singleton, her husband, was dead. The £56.05 was paid to the defendant, and materially aided in the support of herself and children. The complainant, by an arrangement with Daniel Thompson, the purchaser at the sheriff's sale, obtained possession of the land, and has since made repairs and been at considerable expense. After these transactions above stated the defendant removed to Philadelphia, and the complainant being on a visit to that place in 1800 she insisted upon the performance of the contract, again alleging that she had received information warranting the belief that her husband had been killed in the battle with the Indians. He had not in fact been heard of up to that time, which was more than seven years after the battle. Upon her solicitations and assurances, and under the advice of Samuel Cochran, who drew the contract and was a mutual friend, and also of Thomas McKean, Chief Justice of Pennsylvania, who acted as Mrs. Singleton's friend in the business, the complainant consented to accept a deed and to pay the residue of the purchase money, all which was done on the 23d of April, 1800. The deed set forth, in connection with the statement of title, Joseph Singleton's death.

In 1818, Joseph Singleton having meanwhile died, the defendant brought an ejectment for this land in the Supreme Court for New Castle County, and a trial was had at the April Term, 1821. The Court, in that action, charged the jury that any such contract or deed made by a married woman, and executed as the contract and deed in question appeared to have been, was void in law. Consequently, the plaintiff recovered a verdict and judgment in the ejectment. Thereupon, this bill was filed, praying that the defendant may make to the complainant a good and sufficient deed; that the complainant may be quieted in his possession of the land; and for an injunction to restrain further proceedings under the judgment in the ejectment.

The Chancellor [RIDGLEY]. The general question here is, whether a *feme covert*, after she becomes sole, may be compelled to make good or to execute a contract, which was void in its origin and which she could not enter into.

In this case, no fraud can be imputed to either of the parties. The death of Joseph Singleton was equally unknown to both of them, and it appears by Mr. Cochran's testimony, which is annexed to the bill, and makes part of it, that on the 1st of December, 1794, when the articles of agreement were executed, the defendant only expressed *her belief*, of his death, and said *she thought he must be dead although she had no evidence of it*. Afterwards, when the deed was executed, in April, 1800, the length of time between the supposed death and that period, alone seemed to confirm the parties in the opinion of his death. There was no imposition practiced on Mr. Ross, and no fact was concealed from him

which she ought or could communicate to him. The purchase of the land was a hazard, a risk incurred by Mr. Ross voluntarily, and without any deception. Indeed, considering the notoriety of the transaction and the persons consulted, it is not to be believed that Mr. Ross was led into an error by any act, or concealment, or false suggestion. I am satisfied from the disposition of Mr. Cochran, that there was no fraud in the case at the time of the execution of the articles of agreement and deed, nor at any other time. Neither can I find in the whole affair any like accident or mistake. Ignorance is not mistake; neither is error in judgment a ground of relief. The parties blindly entered into a negotiation about the purchase of the land; and after more than five years, Mr. Ross took a deed and paid the purchase money, without a knowledge of the death of Singleton, the husband of the grantor, upon whose death the legality of the contract depended. To relieve in this case would be to relieve against the imprudence of Mr. Ross. He did not know that Sarah Singleton was a *feme sole*. He knew that if her husband was alive she could not convey or grant the land; and knowing that although the woman expressed her belief of his death she had no evidence of it, he ventured on the purchase. It was altogether a calculation of chances, and he trusted to the chance. The probability, indeed, was that the man was dead; but it was only a probability. In short, his eyes were open, and he must abide by the event.

But it is alleged in the bill that this woman executed the deed, received the purchase money, and enjoyed great benefits from it; also, that the complainant expended considerable sums in repairs. All this, in the present stage of the proceeding, we must take to be true; but it is not sufficient to give validity to a transaction that is absolutely null. A contract made by a married woman, without the consent of her husband, is void; and a court of chancery cannot give validity to a contract void in law. The case of Kenge *v.* Delavall, 1 Vern. 326, has some resemblance to this. Sir Ralph Delavall and his lady, by reason of some discontents in the family, agreed to live separately, and there was a separate maintenance settled on the lady, but determinable on the death of either of them. She contracted several debts during the separation. Her husband died. A bill was then brought to subject her jointure to the payment of the plaintiff's debt. The Lord Keeper said that had the separate maintenance continued, there might be some reason for the creditors to follow that, and make it liable to their satisfaction; but that being determined by the death of the husband, he did not see which way the jointure could be charged with it. The reason why the separate estate might be charged was because, according to Peacock *v.* Monk, 2 Ves. Sr. 190 and Hulme *v.* Tenant and wife, 1 Bro. Ch. Rep. 16, 20, a *feme covert,* acting with respect to her separate property is competent to act in all respects as if she were a *feme sole*; but, in all cases of separate property, the power which the *feme covert* has over it arises from the agreement of the husband before or after marriage; and without the

agreement, she can do no act to affect it. 2 Ves. Sr. 190; 1 Ves. Sr. 163, 229, 517.

A married woman can enter into no contract that will bind her after her coverture. If she gave a bond she could not be sued upon it. She cannot personally bind herself, nor her executors or administrators; 4 Bro. Ch. Rep. 483, 487, Sockett *v.* Wray. In Smith, and Helen his wife, *v.* French, 2 Atk. 243, the case is stronger than this, and the principle is clearly laid down by Lord HARDWICKE. A bill was brought for satisfaction of a breach of trust. The husband, after the marriage, conveyed his wife's fortune to the wife's mother, as her trustee, for her separate use. The trustee, at the importunity and repeated solicitation of the daughter, the *cestui que trust* committed a breach of trust by disposing of the trust money for the benefit of the husband, at his instance and request. The wife promised to release; and after she became a widow confirmed the promise. This confirmation alone secured the trustee. The promise of the wife during coverture could not bind her; and, although the case was extremely hard, Lord HARDWICKE would have decided against the trustee, had he not found in the promise of the *cestui que trust*, after she became sole, a defence sufficient to rebut the plaintiff's equity. He compared it to the case of an infant under age, who, contracting a debt during his minority, shows his consent to it by confirming it after he comes of age; which shall effectually bind him, though it was voidable at his election. So here, said he, a promise by the wife to release during the coverture, it is certain, could not bind the wife; but if, after the death of her husband, she repeats the promise, that is a confirmation of it and is good. In that case there was cited from Hobart 225, a case, 7 Ed. 4, 14, in which the wife being a *cestui que use,* she and her husband sold the land. She received the money. They both required the feoffee to make the estate to the vendee; yet she, after her husband's death, in a court of equity, was relieved against the feoffee, and it was held she might also be against the vendee if he were privy to the use.

These cases, and the reason of them, fully establish the principle, that a married woman can make no contracts during her coverture which shall bind her after she becomes sole, unless they be made conformable to certain rules established to operate upon and bind married women. And if Sarah Singleton could be compelled to make a further conveyance to John Ross for the better assurance of this land; or, if she could be restrained from prosecuting to execution her judgment at law recovered in this action of ejectment, she might be compelled, directly or indirectly, to give effect to a contract void both at law and in equity.

Supposing that the complainant has made out his whole case in his bill, with the dispositions annexed, I see no ground upon which I can order the writ of injunction; and although I have been obliged to form a decided opinion upon this application for a writ of injunction, yet, I shall be extremely willing to change my opinion, if the plaintiff shall be

able to satisfy me that it is erroneous. It certainly is a hard case, and I regret that I cannot comply with the prayer in the bill for a writ of injunction. See Bolton *v.* Williams, 2 Vesey Jr. 138; Jones *v.* Harris, 9 Ves. Jr. 486.

This case afterwards proceeded to a final hearing before the Chancellor, at the April Term, 1823, on bill, answer, exhibits and dispositions; and a case of intentional fraud on the part of the defendant having been established by the proofs to the satisfaction of the Chancellor, a decree was made, perpetually enjoining the defendant from prosecuting to execution her judgment in the action of ejectment at law. This decree was affirmed by the High Court of Errors and Appeals, at the June term, 1824.

CONNOLLY *v.* BRANSTLER.

IN THE COURT OF APPEALS OF KENTUCKY, 1868.

[3 *Bush* 702.]

JUDGE ROBERTSON delivered the opinion of the Court:

At a decretal sale of a house and lot in Smithland, Kentucky, for the benefit of the creditors of William Gordon, the first husband of the appellant, Mary Ann Connolly, she, for the purpose of facilitating an advantageous sale, authorized the salesman to announce, as he did, to the attending crowd, that she would not claim dower against any person who should become the purchaser. After that announcement, and on the faith of it, the property was well sold, and finally conveyed to the appellee. Some years afterwards, her second husband and herself brought this suit in equity for obtaining dower; and now complain of the dismission of their petition. The judgment was right.

Although her declaration to the bidders did not legally alienate her dower, yet the sale being made on the faith of it, she is equitably estopped from asserting dower against the purchaser; for the disability of coverture could not exonerate her from fraud.

Wherefore, the judgment is affirmed.[1]

[1] Under the recent legislation by which married women are contractual beings, there is no reason why estoppel should not be invoked, even if it make the woman keep faith by performing her contract. Such would seem to be the general law applicable to the statutory wife. For example, in Bodine *v.* Killeen, 1873, 53 N. Y. 93, the Court aptly said:

"Where there is no legal capacity to contract, a party will not be estopped by falsely representing that he has capacity; that is, the incapacity is not removed by any fraudulent representation of the actor. The law will not permit one legally incapacitated to do that indirectly which he or she

CLARE *v.* EARL OF BEDFORD.

IN CHANCERY, 1690.

[13 *Viner's Abridgment* 536.]

1. A prior incumbrancer witnesses a subsequent mortgage, and told the money lent at his master's chambers, being his clerk, and for that alone had his own security postponed. Tr. 1690. 2 Vern. 151. in the case of Hunsden *v.* Cheyney, cited as the case of Clare *v.* Earl of Bedford.——— Though he was an infant. Tr. 9 Geo. 9 Mod. 38. Savage *v.* Foster, cites the case above, but adds that the infant was clerk to an attorney, and engrossed the subsequent mortgage.

WATTS *v.* CRESWELL.

IN CHANCERY, BEFORE LORD CHANCELLOR COWPER, 1714.

[9 *Viner's Abridgment* 415.]

Bill to have a discovery of the defendant's title to lands in B. mortgaged to the plaintiff, and likewise to have an account of the rents and profits thereof, &c. The case was, the defendant's father having occasion to borrow the sum of £300 the defendant was employed by his father to solicit the plaintiff to lend that sum upon a mortgage of the lands in B. which the father made affidavit of that he was seised in fee, and that the lands were free from incumbrances; the defendant being then about the age of 20 years, did carry a feoffment in fee and fine of the lands of the defendant's father to the counsel of the plaintiff, and the title was ap-

cannot do directly. That is especially the case in respect to infants and married women laboring under common law disabilities, the law imposing the disqualification from motives of public policy, for the safety of those regarded as weak, and needing protection. Keen *v.* Coleman, 30 Penn. 299; Lowell *v.* Daniels, 2 Gray 161; Goulding *v.* Davidson, 26 N. Y. 604. But the reason of the rule closing with the removal of the incapacity, the rule falls. In the management and control of her separate property, when acting by agents, a *feme covert* is answerable for her agent while acting within the scope of the agency, although the fraud may be without her knowledge or assent. Baum *v.* Mullen, 47 N. Y. 577."

And in Smith *v.* Weeks, 1892, 65 Vt. 556, the court said: "Married women cannot enjoy the enlarged rights of action and of property given by our statute and remain irresponsible for the ordinary results of their conduct. Incident to the powers given to married women by our statute is the capacity to be

proved of, and the money lent, and a mortgage made to the plaintiff, and the defendant was a witness to the execution of the mortgage-deed, and likewise to the payment of the money. The defendant's father, after the defendant came of full age, took £100 more upon the same mortgage, and the defendant was privy to that transaction, but not a witness to the deed or payment of the money. The defendant by his answer says, that at the time of making the original mortgage, he had heard the lands were settled upon him after the death of his father, but he had never seen the settlement. The defendant after the death of his father refuses to pay the mortgage, and claims the lands as remainder-man in tail by virtue of a settlement by his grandfather upon the marriage of his father, &c. Counsel for the plaintiff insisted that the defendant, though an infant at the time of making the mortgage, was liable to make a satisfaction, because he was party to the fraud, and was privy to the whole transaction, and aiding and assisting to the cheat, and that though an infant cannot bind himself by contract at common law, yet he is liable to actions of tort, as trespass, case for words, &c. So is he liable to a forfeiture upon a condition in fact, or implied, &c. So in equity he is liable to make satisfaction for a fraud, &c.

Per COWPER, C., if an infant having a remainder upon an estate for life be a witness to a mortgage made by a tenant for life, I do not think this would bind the infant, because if he was made a party to the deed, and sealed it, yet that would not bind him, and that is a much stronger case; yet I am of opinion in this case the defendant is liable, and ought to make satisfaction to the mortgagee, because at the time of this transaction he was very near being of full age, and solicited the plaintiff to lend the money, and produced this feoffment in fee to his father (which appears now to be forged), and was principally concerned all along in the fraud, when he knew at the same time, as he admits by his answer, that his father was but tenant for life, with remainder to himself. If an infant is old and cunning enough to contrive and carry on a fraud, I think in a court of equity he ought to make satisfaction for it. Decreed accordingly.

bound and to be estopped by their conduct. Sargeent *v.* French, 54 Vt. 385; Brown *v.* Thomson, 31 S. C. 436, 17 Am. St. Rep. 40; Lane *v.* Schlemmer, 114 Ind. 296, 5 Am. St. Rep. 621; Knight *v.* Thayer *et al.*, 125 Mass. 25; Patterson *v.* Lawrence, 90 Ill. 174, 32 Am. Rep. 22; Rusk *v.* Fenton, 14 Bush 490, 29 Am. Rep. 413."

If, however, the wife is incapacited to do a specific act, *e. g.* to bind herself as surety for her husband, the old rule prevails, Farmington National Bank *v.* Buzzell, 1880, 60 N. H. 189.

In the absence of statute, however, the recent tendency was, and is, to hold the wife liable for the misrepresentation. For a collection of authorities, see Pomeroy's Equity Jurisprudence, 3d ed., § 814. For the English decisions to the same effect, see note to same section.

EVROY *v.* NICHOLAS.

IN CHANCERY, BEFORE LORD CHANCELLOR KING, 1733.

[2 *Equity Cases Abridged* 488.]

A, a minor, of seventeen, permitted and witnessed for the sum of £157, his guardian to sign a demise to the plaintiff of the infant's lands for twenty-one years, to begin six months before the infant's majority, at which time a lease in being would determine. Dissatisfied with the bargain, the infant demised the land to one C, who entered upon and evicted the plaintiff and took a crop of corn which the plaintiff had sowed. Whereupon the plaintiff filed his bill against the erstwhile infant for a new lease of the premises for twenty-one years or the return of the £157 and against C to have satisfaction for the crops. It was urged that the lease of the infant was in point of law void, or might be avoided by the infant at his majority.[1]

KING, Chancellor: Infants have no Privilege to cheat Men. This Lease was made with the Consent and Approbation of A, the Infant, who was above the Age of Discretion, and knew what he was doing, and it's certain his consenting to the Lease was the only Inducement the Plaintiff could have to take it at so large a Fine, being he was not to possess the Lands 'til six Months before Determination of the Infancy, &c., and therefore whether ever the Money came to A's Hands or not, he ought to make good the Lease or refund the Fine; for otherwise the Plaintiff and all other Persons would be defrauded by the Collusion of an Infant and his Guardian; and so decreed, that on A's refusing to make a Lease, he should repay the Fine. But as to the Crop, his Lordship would not meddle about that, because in Point of Law the Lease was absolutely null. N. B. YORK, Attorney-General, in his Argument cited this Case: A, Tenant in Tail, wanting to mortgage his Estate, B, his Son and Heir, being an Infant of about sixteen Years old, solicited the Loan of the Money, and a Mortgage was made without acquainting the Mortgagee of the Intail. Upon A's Death, B set up the Intail against the Mortgagee; but Equity charged the Estate-tail with the Mortgage, because of the Fraud which the Infant had been guilty of. Ibid.[2]

[1] The statement of the case is shortened.

[2] For a case in which the court of chancery forced an infant to make good a representation though it enforced a contract, see Nelson *v.* Stocker, 1859, 5 Jur. n. s. 262.

For cases on application of Estoppel to infants, see Pomeroy's Equity Jurisprudence (3d ed.) § 815.

ROBINSON *v.* PATTERSON.

IN THE SUPREME COURT OF MICHIGAN, 1888.

[71 *Michigan* 141.]

On a bill for the specific performance of a contract, it appeared that one Frederick D. Larke, a local commissioner on a State road, made a contract, dated September 25, 1882, in the name of Augusta Larke, his wife, with one James B. Patterson, who had previously made a contract with the State for the construction of a State road; that said Patterson located and reserved, to be received in payment for the work, some 5,000 acres of swamp lands of the State: that said lands were located by said Patterson from information and minutes furnished to him by said Augusta Larke, in consideration of which information the said Patterson agreed to convey to her, her heirs and assigns, an equal, undivided interest with the knowledge of Patterson, who promised to do nothing to of Presque Isle.

It further appeared that Augusta Larke, on December 19, 1882, sold and conveyed to the complainant her interest in the said contract, as actually executed, for the sum of $2,600; that complainant purchased said interest with the knowledge of Patterson, who promised to do nothing to prejudice complainant's right to said lands or to cast cloud upon the title; that Patterson assured the complainant that the contract between him and said Larke was *bona fide* and that the complainant, believing the representations of the said Patterson and Larke, paid the $2,600 in the utmost good faith.

It further appeared that the lands in question were reserved and located in the name of defendant and of defendant's father in disregard of complainant's contract, and that one Newell, Commissioner of the State Land Office, threatened to issue the patents of said lands to the Pattersons.

Thereupon complainant prayed for an injunction and a specific performance of the contract whereof he was assignee.[1]

SHERWOOD, C. J. Such is the substance of the pleadings. The lands included in schedule No. 3 are not involved in this issue. The proofs were taken before a commissioner, and the cause was heard before Judge EMERICK, who made a decree dismissing complainant's bill as against the Pattersons and Newell, and that they recover their costs; holding that the material facts of the complainant's bill were not sustained by the proofs, and that the contract set up in the bill, as between these parties, in which complainant claims an interest, was against public policy, and void. In these views of the learned circuit judge we fully concur. We

[1] The statement of the facts is much abbreviated and unessentials are omitted.

shall not attempt a recapitulation of the evidence. We will say, however, that it discloses a state of facts which can never be looked upon with any favor in a court of equity. While the case shows the material facts set up in the bill are not sustained, it does appear from the testimony that the facts stated in the answers are in the main true. If the facts in regard to the making of the contract are not such as claimed by the Pattersons, and if it was not subject to the objection that it is against public policy, it may be very well questioned whether it presents matters within equitable cognizance.

But we pass this, and will only say, further, that the claimed contract contains provisions which are clearly against public policy, and it is therefore void. It appears from the complainant's own showing that Mr. Larke was the local commissioner of the State, and charged with an important official duty in approving of the work and accepting the job. This deprived him from taking any interest in the pay for the work which would have a tendency to prejudice the rights of the State by favoring the contractor. The interest he took, or claims to have taken, could not fail to have this tendency, and render the agreement void. The taking of the interest in the wife's name is manifestly only a part of the scheme to avoid the construction the law places upon the transaction, and rather strengthens, than otherwise, the conclusion to which the circuit judge arrived; and the complainant stands in no better position than would Larke if suit had been brought in Mrs. Larke's name. Contracts in their nature calculated to influence the action of public officers, and the effect of which is to influence them one way or the other, are against public policy, and void. Webbers *v.* Blunt, 19 Wend. 188; Winter *v.* Kinney, 1 N. Y. 365; Patton *v.* Nicholson, 3 Wheat. 204; Mitchell *v.* Smith, 4 Dall. 269; Brown *v.* Tarkington, 3 Wall. 377; Thomas *v.* Caulkett, 57 Mich. 392, 24 N. W. Rep. 154; Snyder *v.* Wiley, 33 Id. 483; Whitaker *v.* Cone, 2 Johns. Cas. 58; 1 Add. Cont. 387; Richardson *v.* Crandall, 48 N. Y. 348; Gray *v.* Hook, 4 Id. 449; Bartle *v.* Nutt, 4 Pet. 184; O'Hara *v.* Carpenter, 23 Mich. 410; Eberts *v.* Selover, 44 Id. 519, 7 N. W. Rep. 225; Weber *v.* Weber, 47 Id. 569, 11 N. W. Rep. 389; Hovey *v.* Blanchard, 13 N. H. 145; Ins. Co. *v.* De Wolf, 8 Pick. 56; Knowlton *v.* Spring Co., 57 N. Y. 534.

The estoppel claimed by complainant in this case, if the facts were proved as claimed, could not have the effect sought to be attributed in this case. Public policy will not allow the doctrine of estoppel to come in, and aid in validating an unexecuted contract which it holds to be void.

The decree at the circuit must be affirmed, with costs.

CHAMPLIN, MORSE and LONG, JJ. concurred. CAMPBELL, J. did not sit.

STATE OF MICHIGAN *v.* THE FLINT & PERE MARQUETTE RAILROAD COMPANY ET AL.

IN THE SUPREME COURT OF MICHIGAN, 1891.

[89 *Michigan* 481.]

GRANT, J.[1] The bill of complaint in this case, which is on the information of the Attorney-General, prays for an injunction to restrain the defendants, first,—

"From sales of any of the lands described in said Exhibit A, or from selling any timber upon said lands, or committing any waste, either directly or by their agents, and from asserting and claiming any title to said lands and premises; and that the title of the State of Michigan in and to said lands, under and by virtue of the land grant of the Congress of the United States, made September 28, 1850, may be decreed and declared to be full, complete, and absolute, which decree may stand and operate as a removal of all clouds to said title by reason of the claim or claims made by the said defendants, or any of them, or other parties interested herein, by virtue of said railroad grant or trust-deed; and that the said Flint & Pere Marquette Railroad Company, and its trustees and land commissioner, aforesaid, defendants herein, be required by the decree and order of this court to account to and with the State of Michigan, complainant herein, for any and all timber cut upon said premises directly by said defendants, or by their agents or authority, and that said complainant may have decree for any amount due it upon such an accounting."

The State of Michigan claims title to the land described in Exhibit A under and by virtue of the grant usually known as the "Swamp-Land Grant," of September 28, 1850, by the Congress of the United States.

The defendants claim to have derived their title through an act of Congress passed on or about June 3, 1856, granting to the Flint & Pere Marquette Railway Company certain lands in the State of Michigan, to aid in the construction of a railroad in said State, and the act of the Legislature of the State of Michigan passed February 14, 1857, conferring the lands upon said railway company, subject to the act of Congress and to the act of the Legislature referred to.

The claims of the respective parties will appear in the abstracts of the bill and answer, taken from the brief of the counsel for the defendants and appellants, and found at the end of the opinion.

Decree was entered in the court below for complainant, declaring the title to be in the State; that the cloud upon the title to the lands, arising

[1] A portion of the opinion dealing solely with facts is omitted.

from the claim of the defendants, be removed; and referring the cause to a commissioner to take evidence of State taxes paid by the defendants upon the lands, and the value of the timber cut therefrom.

I deem it necessary to discuss and determine only the question of estoppel, raised in this case; for, if the complainant is estopped to now set up title in itself to the lands in controversy, the other questions become unimportant.

That the State, as well as individuals, may be estopped by its acts, conduct, silence, and acquiescence, is established by a line of well-adjudicated cases.

In Massachusetts, in the year 1825, the commonwealth was held estopped from setting up alienage in a grantee to whom it had conveyed land. Com. *v.* Heirs of Andre, 3 Pick. 224. In that case the state had conveyed the land by deed to Andre. The court held:

"This deed must operate as a rebutter, as it would if an individual were the grantor; and with more reason, because the commonwealth is not liable to an action. The commonwealth, if the land were recovered, would feel itself bound to repay the consideration money, with interest. This would be a claim which could not be resisted without degrading the country."

It has been held that the United States government was estopped from disputing certain boundary lines, and from denying that certain lands were within them. U. S. *v.* McLaughlin, 30 Fed. Rep. 147. The court in that case said:

"A construction of the law and understanding of the facts, acted upon by all departments of the government, by the public, and even by the claimant himself, for nearly a quarter of a century, should not now be disturbed. The government should be now estopped from alleging that it (the boundary line) is or should be located elsewhere. The law of estoppel, in a proper case, applies to the government."

In State *v.* Milk, 11 Fed. Rep. 389, it is said:

"Resolute good faith should characterize the conduct of States in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel." See, also, authorities there cited.

Where the State granted its land as a part of a wagon-road grant, which had been conveyed to the State under the swamp-land act, it was held estopped to deny that the land was within the wagon-road grant. Cahn *v.* Barnes, 5 Fed. Rep. 326. In that case the State first granted the land to the plaintiff as wagon-road land, and subsequently conveyed it to the defendant as swamp land.

The case of Hough *v.* Buchanan, 27 Fed. Rep. 328, arose under the swamp-land act, and the act of Congress granting certain lands to the State of Iowa to aid in the construction of railroads. That case is the exact parallel of this, so far as the indemnity lands are concerned. The complainants obtained their title from the railroad act, and the defendant

claimed title under the swamp-land act. After reciting the facts, the court said:

"If, under these circumstances, it should now be held that the State is not debarred from asserting a claim to these lands under the swamp-land act, it is clear that a fraud would thereby be perpetrated upon the company and its grantees. Should it, however, be held that it was open to the State, or its grantees, to contest the validity of the transfer to the railway company, such contest must certainly be made within a reasonable time. The county, upon its organization in 1859, caused these lands to be listed as swamp lands, and the list was forwarded through the proper channels to the department at Washington. The Commissioner refused to certify the lands under the swamp-land act, holding as a matter of law, that the certification made thereof in 1858 to the railway company defeated the right to claim them under the swamp-land act. It does not appear that the county or its grantees have since taken any further action in the premises. They knew that the lands had been certified to the railway company in 1858; that the Commissioner of the Land Office had refused to certify the lands under the swamp-land act; that the railway company and its grantees were claiming the land, and asserting title thereto by paying taxes assessed thereon; and yet for 25 years the defendant and his grantors have done nothing to perfect the evidence of their title, or assert any right to the land. Certainly their claim must be regarded as stale, and not entitled to favorable considerations at this late day."

In Pengra *v.* Munz, 29 Fed. Rep. 830, the question raised was similar to that in Cahn *v.* Barnes, *supra,* and the same rule was enunciated.

In U. S. *v.* Railway Co., 37 Fed. Rep. 68, it is said:

"Parties place faith, and should place faith, in the action of the government, and rely upon the title which its patent conveys; and when, as appears in this case, many parties have purchased in perfect reliance upon the title of the patent, and many years have passed with it unchallenged, common fairness requires that the title thus apparently conveyed should be sustained, unless it be very clear that there was a want of authority to issue it."

In Attorney-General *v.* Ruggles, 50 Mich. 124, the State asked for the cancellation of certain certificates for the purchase of agricultural college lands. There, as here, counsel for the State sought to make a distinction in the doctrine of estoppel as applied to the State and individuals. But this Court, speaking through Mr. Justice MORSE, said:

"I see no reason to distinguish this case, although the State is a party, from like cases between individuals."

This brings us to a statement of the facts applicable to this branch of the case. By the act of Congress of June 3, 1856, certain alternate sections of the public lands were granted to this State to aid in the construction of certain railroads. The State, through its Legislature, by Act No. 126, Laws of 1857, accepted the grant, and provided the ways

and means to carry out the trust thereby reposed in the State. Certain citizens of this State, and, I presume, some from other States, organized the Flint & Pere Marquette Railway Company, and, under the authority conferred upon it by the State, immediately commenced and prosecuted its work to completion. The territory through which the road was constructed was practically a wilderness. It is evident that it could not then have been built without this grant of lands. As an additional inducement, the State agreed to exempt the lands from taxation for a certain number of years, and gave the railroad the right of way over its own lands. The company in all respects complied with the law, and as each 20 miles of its road was completed it was inspected by the proper State officials, and the fact certified to the United States government. It then became entitled to the odd-numbered sections, corresponding to each 20 miles so constructed.

The lands in controversy in this suit, in all about 16,000 acres, were selected, identified, and certified, in the years 1859 and 1860, as having been granted to the State under the railroad act of June 3, 1856. These certificates were sent to the State by the Department of the Interior, and filed in its appropriate department. From that time to the time of filing the bill in this cause, in December, 1887, the State never called in question the right of the railroad company to these lands. Meanwhile three-fourths of the lands have been sold and conveyed by the company to innocent purchasers. The lands have been improved, buildings erected, and taxes paid, both State and municipal, for many years. The railroad's claim of ownership was open and notorious.

The identification of these lands, and their certification to the State, were a solemn declaration on the part of the United States that they came to the State under the railroad grant, and not under the swamp-land grant. This declaration stood for 28 years without challenge from the State, and with the evidence thereof on file in its own department. It knew that the railroad company took these lands under the railroad act, and was selling them and conveying them to hundreds of its citizens for farms and other purposes; and yet it slept upon its rights until it has reaped the benefits of the construction of the railroad, and the available public lands have in all probability been exhausted, so that the company cannot now receive the compensation it was entitled to under the acts of Congress and the State, and until these lands have been enhanced many times in value, at the expense of the defendant company and its grantees.

No question is raised as to the good faith on the part of the railroad company and its officers, nor is it hinted that there was any collusion between the officers of the State and those of the railroad company.

The complainant, therefore, had in its possession the evidences of its title. It is urged by council for the State that none of its officers or agents examined or knew of the contents of these field-notes, and that this constitutes a legal excuse for not applying to it the doctrine of estoppel.

The State, therefore, seeks to apply the doctrine of estoppel to the railroad company and its grantees, but denies that it is applicable to itself. What reason can be forced for such a position? Let us apply the case to individuals. Should A., assuming to own large tracts of land, convey certain of them to B., in trust to be conveyed to C.; upon the payment of a valuable consideration, which, when paid, will inure to the benefit of B. as well as of C.; the consideration is paid; the lands conveyed; B., under the power he possesses, imposes annual burdens upon these lands for 15 years, which C. pays; B. sleeps for 28 years upon his rights, in ignorance that the title at the time of the conveyance to C. was in him; and C. has meanwhile openly and notoriously asserted his title, and dealt with the lands as his own, has mortgaged, sold, and conveyed them, and all this while the evidence of title is in the possession of B.,—would not B. be estopped to assert his title? It is said in U. S. *v.* Military Road Co., 41 Fed. Rep. 493:

"Whatever is inequitable as between man and man, in their dealings with each other, should also be deemed inequitable as between the United States and those with whom they condescend to deal under like circumstances."

Applying the principles of the above cases, and others that might be cited, to the present case, I can find no escape from the conclusion that the claim of the complainant has become stale, and that it is now estopped to assert title in itself. The claim of the State has no foundation in equity, justice, or good conscience. The maxim that "where one of two parties, neither of whom has acted dishonestly, must suffer, he shall suffer who, by his own act, has occasioned the confidence and consequent injury of the other," applies to the present case, in which Mr. Sleeper, the Deputy Commissioner of the State Land Office, testifies that it required the labor of three years to examine the records in that office and collate the evidence upon which he now bases the claim of the State.

The decree of the court below must be reversed, and the bill dismissed, with costs of both courts.

The other Justices concurred.[1]

[1]See authorities *pro* and *con* in Bigelow's Estoppel, 5th ed., pp. 340-341.

SECTION 6. CONVERSION, RECONVERSION, AND ELECTION.

DAVIE *v.* BEARDSHAM.

IN CHANCERY, 1663.

[1 *Chancery Cases* 39.]

See this case as printed *ante*, p. 310.[1]

CARFOOT *v.* CARFOOT.

IN CHANCERY, 1663.

[1 *Chancery Cases* 35.]

Lands were devised to the *feme* for life, afterwards to be sold by the executor for younger children's portions; the executor dies, the *feme* dies: the younger children prefer their bill against the heir; he demurrs, because but an authority in the executor, which is dead with them, but the demurrer was overruled.

[1] "I will say nothing particular of the second question, being merely consequential to the determination of the first; for there is no case, where the representative of the personal estate is intitled to claim the money, arising by sale of the lands, as personal estate; except where one or other of the contracting parties in the purchase is intitled to carry it into execution in a court of equity: For where the court holds, it ought not to be executed, there is no conversion of real into personal in consideration of the court, upon which that right of the executor depends: for if not effectually converted into money, it must be considered according to its original nature as real; and the heir at law must have the benefit. Whether there is any such conversion, depends on there being an effectual agreement binding on all parties, so as under all the circumstances it ought to be carried into execution upon this general principle of equity; that what is contracted for valuable consideration to be done, will by the court be considered as done; all the consequences arising as if it had been so, and as if a conveyance had been made of the land at the time to the vendee. But if the circumstances are such, that it cannot now, or ought not to be carried into execution, though once it might, these consequences cannot follow; for the court must consider it as land, and the money as the party's own, who was to be the purchaser." Per Lord HARDWICKE in Atty.-Gen. *v.* Day, 1748-9, 1 Vesey Sr. 218, 220.

GREENHILL *v.* GREENHILL.

IN CHANCERY, BEFORE LORD CHANCELLOR COWPER, 1711.

[2 *Vernon* 679.]

Mr. Greenhill the testator employed one Young to article for the purchase of lands, part whereof lay in Cornwall, and are called customary lands, and although they pass by lease and release; yet by the custom of the county palatine of Cornwall, they cannot be devised without a surrender.

The articles were made in April, the consideration-money paid, and conveyance to be executed at Michaelmas then next following. In June the testator made his will, and devised the residue of his personal estate, after debts and legacies paid, to be laid out in land; and the lands so to be purchased, together with his freehold estate, to be settled on the plaintiff and his first son, &c.

The testator afterwards at Michaelmas entered, and paid the consideration-money, and in Michaelmas 1707, conveyances were perfected, an Act of Parliament being found necessary, and died, leaving the defendant, and the plaintiff's mother, his daughters and co-heirs.

The question was, whether the land thus contracted for, especially the customary lands, passed by this will.

Decreed for the plaintiffs, and confirmed upon a rehearing. And the principle of this case acknowledged in Langford *v.* Pitt, 2 P. Wms. 629, and cases cited in note there.

First. That the articles being made in April, 1706, and the will in June following, although possession was not to be given till Michaelmas following, it was such an interest as was devisable, and well passed by the will. That the words were sufficient; all the residue of his personal estate to be invested in land, and together with his freehold estate to be settled. The freehold estate was mentioned only in contradistinction to his personal estate. Whether real or personal, the whole intended for the plaintiff.

Objection.—First. The articles were in Young's name; and Young made no declaration of trust in writing.

Secondly. The estate of *feme covert.*

Thirdly. No surrender of the customary estate.

Per Cur. An equitable interest is as well devisable, as a legal estate. A future interest is devisable. No surrender wanting; because he had an equitable, and not the legal estate (this seems to be clearly settled by King *v.* King, 3 P. Wms. 358, and cases cited in not., p. 360 there): and Young having owned the trust, and the *feme covert* not opposing; but having submitted to, and conveyed according to the articles, these objections were not material.

The testator after the date of his will, having taken a conveyance to himself and his heirs.

Q. If it did not amount to a revocation. This question must be decided by the principle on which revocation stands, namely, that the estate must remain in the same plight, and unaltered at the testator's death, as it was in at the time of executing the will, Sparrow *v.* Hardcastle, 3 Atk. 798, 803. But by the report of the case in Pre. Ch. 320, the conveyance was to Young.[1]

SCUDAMORE ET AL. *v.* SCUDAMORE.

IN CHANCERY, BEFORE LORD CHANCELLOR MACCLESFIELD, 1720.

[*Precedents in Chancery* 543.]

The Lady Jane Scudamore, by her will in 1696, gave the sum of £8,000 to her daughter, Mrs. Prince, to be laid out by her in a purchase of lands, to be settled to the use of herself for life, with remainder to John Scudamore and his heirs, and in case he died in the lifetime of the said Mrs. Prince, to the Lord Scudamore, his heirs, executors, and administrators. John Scudamore died in the year 1714, and in the lifetime of Mrs. Prince. The Lord Scudamore likewise died in the lifetime of Mrs. Prince, in the year 1716, having about three months before his death made his will, and the plaintiff his lady executrix, and having given several legacies to the other plaintiffs, and leaving the defendant, Frances Scudamore, his only daughter and heir at law, an infant; and in the year 1717 Mrs. Prince died, and the money had never been laid out; and now this bill was brought by the plaintiff against the Lady Frances, heir at law, and against the executors of Mrs. Prince, to have the money for the benefit of the executors and legatees of the Lord Scudamore, and that no purchase might be made for the benefit of the defendant, the heir at law of Lord Scudamore.

[1] As appears from Langford *v.* Pitt, 1731, 2 P. Wms. 629, Sir Joseph Jekyll appeared for the plaintiff in the principal case, and when pressed with his argument, thus distinguished the past from the present:

"I admit the case of Greenhill and Greenhill, in which I myself was of counsel, to have been so determined; but this material difference is observable between the two cases: there the articles for the purchase were entered into by the testator before he made his will, and so the equitable interest was desirable, but in the present case Governor Pitt's will was made prior to the articles for this purchase, before he had any equitable interest in the land, consequently when he had no kind of title, he could devise nothing."

It may be of interest to note in passing that the defendant Pitt was the grandfather of "the Great Commoner."

For the distinction here taken, see Alleyn *v.* Alleyn, 598, ***post.***

Lord Chancellor was clear of opinion, and decreed accordingly that the money belonged to the defendant, the heir at law, as the lands would have done if a purchase had actually been made, as it ought to have been, by Mrs. Prince, the trustee, and that to decree it otherwise would be to put it into her power and election which of the two should have it; for if the purchase had been made, it must have gone to the heir, but if she, by delaying the purchase, may alter the right, and give it to the executors, this would be to make it her will, and not the will of the first testator, which would be very unreasonable and inconvenient; and therefore, though the trust for laying out the money was personally confined to Mrs. Prince, without nominating executors, yet they were implied and included in it; and this case was the stronger, because the heir at law of Lord Scudamore was an infant, and as Mrs. Prince survived my lord two years, the infant heir might have brought her bill against Mrs. Prince herself, the trustee, to have had the purchase made, and her laches in not doing it is not to turn to her prejudice, being an infant. The cases cited were Linguen and Souray in Lord HARCOURT'S time, and a case lately decreed of Jones cont. Powell.

NOTE.—In this case it was agreed by my Lord Chancellor to be a declared rule in this court, that if money be devised to be laid out in the purchase of lands, to be settled on one and his heirs, that the person himself, for whose benefit the purchase was to be made, may come into this court and pray to have the money itself, and that no purchase may be made, because none have an interest in it but himself; but if he dies before the purchase made, or payment of the money, so that the question comes between his heirs and executors, which of them shall have the money, the heir shall be preferred, and it shall for his benefit be considered in a court of equity, as if the purchase had been actually made in the life of his ancestor, for two reasons: 1st. Because the heir is to be favored in all cases, rather than the executors, who by the old law were to have nothing to their own use. 2d. If the executor should have it, it would be against the words of the will, which gave it to the heirs.[1]

[1] "The rule equally applies to money devised to be laid out in land. The authorities to show that money agreed or directed to be laid out in land is to be considered as land are very numerous. The force of the rule is particularly evinced by those cases in which it has been held that the money agreed or directed to be laid out so fully becomes land as, first, not to be personal assets. Earl of Pembroke *v.* Beighden, 3 Ch. 115; 2 Vern. 52; Lawrence *v.* Beverly, 2 Keble, 841; cited also in Kettleby *v.* Attwood, 1 Vern. 298, 741. Secondly, to be subject to the curtesy of the husband, though not to the dower of the wife. Sweetapple *v.* Bindon, 2 Vern. 536; Otway *v.* Hudson, 2 Vern. 583. Thirdly, to pass as land by will, if subject to the real use at the time the will was made. See ch. 4, § 2, note (n). See also Milner *v.* Mills, Mosely 123; Greenhill *v.* Greenhill, 2 Vern. 679; Prec. Ch. 320; Shorer *v.* Shorer, 10 Mod. 39; Linguen *v.* Souray, 1 P. Wms. 172; Guidot *v.* Guidot, 3 Atk. 254. Fourthly, not to pass as money by a general bequest

ALLEYN *v.* ALLEYN.

IN THE ROLLS, BEFORE SIR JOSEPH JEKYLL, M. R., 1729

[*Mosely*, 262.]

One Stephenson made his will in 1727 devising all the reversion and inheritance of his lands, &c., to one Allen, his grandson, and the residue of his personal estate to his executor, in trust to be laid out in lands to the use of said grandson. In 1728 the testator contracted for the purchase of land and died. The purchase was completed by the executor, and the question was whether the land purchased after the will, passed to the testator's heir, one Mrs. Alleyn, or to the testator's devisee, who in the case was the son of Mrs. Alleyn.[1]

Master of the Rolls [Sir JOSEPH JEKYLL]. I am of opinion that the

to a legatee, but it will by a particular description, as so much money to be laid out in land. Cross *v.* Addenbroke; Fulham *v.* Jones, cited in a note to Lechmere *v.* Earl of Carlisle, 3 P. Wms. 222; or by a bequest of all the testator's estate in law and equity. Rashleigh *v.* Masters, 1 Ves. Jr. 204. But equity will not consider money as land unless the covenant or direction to lay it out in land be express. Symons *v.* Rutter, 2 Vern. 227; Curling *v.* May, M. 8, G. 2, cited in Guidot *v.* Guidot, 3 Atk. 255. And as money agreed or directed to be laid out in land shall in general be considered as land, so land agreed or directed to be sold shall be considered and treated as money. Gilb. Lex Prætoria, 243; but see Ashby *v.* Palmer, 1 Merivale 296. As to from what time the conversion shall be supposed, see Sitwell *v.* Bernard, 6 Ves. 520; Elwin *v.* Elwin, 8 Ves. 547. And the creditors of the bargainer may compel the heir to convey the land. Best *v.* Stanford, 1 Salk. 154. But it must not be understood that where a testator directs his real estate to be sold for purposes which are answered out of the personal estate the next of kin may insist upon the real estates being sold, for 'there is no equity between the next of kin and the heir; but the general principle is, that the heir takes all that which is not for a defined and specific purpose given by the will.' Chitty *v.* Parker, 2 Ves. Jr. 271; *ex parte* Bromfield, 1 Ves. Jr. 453; Oxenden *v.* Lord Compton, 2 Ves. Jr. 69; Walker *v.* Denne, 2 Ves. Jr. 170; Lord Compton *v.* Oxenden, 2 Ves. Jr. 361; but see Wheldale *v.* Partridge, 8 Ves. 235. And where the testator was entitled to a fund, as money or land, his real and personal representatives shall take it as money or as land, according as the testator would have taken it. See Ackroyd *v.* Smithson, and the cases there cited. 1 Bro. Ch. 503. See also Hewitt *v.* Wright, 1 Bro. Ch. 86, as to Lord THURLOW'S opinion that money resulting to the heir, as being produced by sale of real estate undisposed of, is to be considered as personal estate of the heir, and as such would go to his executor. Russell *v.* Smythies, 1 Cox 215. But if the use and possession were not united it would still be considered as land. Rashleigh *v.* Masters, 1 Ves. Jr. 201; Wheldale *v.* Partridge, 8 Ves. 235." Fonbl. Eq. B. 1, ch. 6, § 9, note (t).

[1] The above statement is taken principally from the marginal note, to the case.

plaintiff is intitled to this estate contracted for, and the purchase whereof was compleated by the executor; and though the conveyance was taken by the executor in his own name, he is only her trustee; so the question is open, whether this estate shall be considered as real estate. The council for the defendant does not deny that it ought to be considered as real estate, if it was not for the directions of the will, to lay out the personal estate in lands. In the case of Commissioner Trimuel who contracted for lands at a future day, and then devised all his lands; Lord HARCOURT held the lands contracted for would pass, which strongly proves, that lands contracted for are to be considered as purchases, and then it is as clear, that these lands being contracted for, after the making the will, will not pass by it: The case of Sir Owen Buckingham was adjudged on an ejectment in the Court of Common Pleas, and afterwards on another ejectment brought in the Court of King's Bench, and that judgment affirmed in Parliament on writ of error; and therefore since these lands will not pass by the will, and must be considered as part of the testator's real estate, they must descend to the plaintiff, his heir, and she cannot be defeated of them, but by the express words of the will, or by necessary implication; and I think the words of the will, that the residue of his personal estate shall be invested in lands, &c., is not either an express disinherision, or by implication. The personal estate is not to be considered as it stands at the time of the making the will, but at the time of the testator's death, because till that time, it is in a constant fluctuation, but so much of it as would serve for the purchase of these lands lost the quality of personal estate in this Court at the time of his death, and became real estate, and he has shewed his intention to alter the nature of this estate, having by a subsequent act controlled his will as to so much, and this is clear from hence, that if he had lived to complete the purchase, the lands would not have passed as real estate, because the purchase was subsequent to his will, nor as personal estate, because the nature of it was altered, and the accident of his dying before the purchase was compleated, makes no alteration: So here is no ground to say, it was his intention to give all his real and personal estate, because, he was going to apply part of his personal estate in such a manner, that it would not have passed by this will, either as his real or personal estate, and it would be the same thing, if he had given the defendant all his real and personal estate, for his intention plainly appears to take so much out of his personal estate, and he shows no design to pass it as his real estate, because by law it could not pass by this devise.[1]

[1] Such money will be bound by a judgment as would land. Frederick *v.* Aynscombe, 1739, 1 Atk. 392. Conversely land contracted to be sold cannot be reached by the vendor's creditors. Turner *v.* Davis, 1883, 41 Arkansas 270. So money directed or agreed to be laid out in land has been held subject to courtesy. Sweetapple *v.* Bindon, 1705, 2 Vernon 536; Cunningham *v.* Moody, 1748, 1 Vesey Sr. 174. Upon the principles of equitable conversion a devise

GUIDOT *v.* GUIDOT.

IN CHANCERY, BEFORE LORD HARDWICKE, 1745.

[3 *Atkyns* 254.]

The bill was brought that the defendant, Mr. Guidot, may account for £4,000 and interest from August, 1735, and that the defendant, Mr. Child, may account for £1,800 pounds and interest.

By articles made previous to the marriage of Anthony Guidot (the defendant's brother) with the plaintiff, reciting "her portion to be £2,800, and that the defendant, as an advancement of his brother, and for a better provision for the plaintiff and the issue of the marriage, had agreed to pay £4,000, it was thereby declared and agreed that the £2,800 and the £4,000 should be laid out in the purchase of lands in Great Britain, or in some church, college, or other renewable lease, to be settled to the same uses and trusts as the freehold and leasehold estates (which Anthony was seised and possessed of) are appointed to be settled, the last limitation to Anthony and his heirs, and until a purchase could be had in trust for the trustees to put out the said money upon mortgages, or on government or other securities, and to apply the produce as if lands had been purchased."

The £2,800 and the £4,000 have not been invested in the purchase of any freehold or leasehold lands, but the same remained in money to the death of Anthony Guidot.

"Anthony Guidot by his will devised all his freehold, leasehold, and copy-lands lying in Islington, and in Elsfield in Hampshire, or elsewhere, to the plaintiff during her life, and after her death to the defendant Guidot and his heirs; and as to his personal estate of what nature and kind soever, he gave the same to the plaintiff, paying his debts and legacies, and made her and defendant Guidot his executors."

The plaintiff insisted that the £2,800 and £4,000 ought to be taken to be part of the testator's personal estate, and that she is entitled thereto as part of the *residuum* of such personal estate bequeathed to her by the testator's will, and that the defendant Guidot had no power to make any purchase with these two sums, it not being the intent of the articles.

The defendant Guidot submitted to the court whether the £2,800 and £4,000, being a marriage portion articled to be paid out on land, is not in this court considered as land, and consequently does not belong to the plaintiff, nor is included in the bequest of personal estate; and likewise leaves it to the judgment of the court whether these sums ought

to an alien which would be void as land may be good as a gift of money. Craig *v.* Leslie, 1818, 3 Wheat. 563, post. 611; Da Hourmelin *v.* Sheldon, 1838, 1 Beavan, 79; DeBarante *v.* Gott, 1849, 6 Barb. 492, 497.

not to be laid out in the purchase of land, and settled to the uses of the marriage articles and will.

The counsel for the plaintiff cited Soresby *v.* Hollings, August 6, 1740, and 1 P. Wms. 172, and Mallabar *v.* Mallabar, Cases in Ch. in the time of Lord Talbot, 78, and 1 Rolls 725, and Curling *v.* May, M. term 8 Geo. 2, before Lord TALBOT; the last case with an intent to show that, when it is doubtful, whether it ought to be considered as money or land, this court will not interfere; and they stated it thus:

"A gives £500 to B in trust that B should lay out the same upon a purchase of lands, or put the same out on good securities for the separate use of his daughter H (the plaintiff's then wife), her heirs, executors, and administrators, and died in 1729. In 1731 H, the daughter, died without issue before the money was vested in a purchase; the husband as administrator brought a bill for the money against the heir of H, and the money was decreed to the administrator, for the wife not having signified any intention of a preference, the court would take it as it is found; if the wife had signified any intention, it should have been observed, but it is not reasonable now to give either her heir or administrator, or the trustee, liberty to elect; for Lord TALBOT said, it was originally personal estate, and yet remained so, and nothing could be collected from the will, as to what was the testator's principal intention."

Mr. Attorney-General cited for the defendant the case of Linguen *v.* Souray, Prec. in Ch. 400, and 1 P. Wms. 172.

Lord Chancellor. The question is, whether these two sums are to be considered as money or land; I see but very little doubt in this case (and stopped Mr. Attorney-General from going on for the defendant).

The articles say, it shall be laid out in the purchase of lands of inheritance, or in church, and leasehold.

Then the court must take it to be the one or the other; and during the life of the husband and the wife, if laid out, it must have been in one or the other.

No sort of election was made by the husband; then at the time of the will and his death, it stood in equity as it did in the articles, either to be laid out in freehold or leasehold; and, therefore, this court will call it one or the other, according to the rule in equity, that what is agreed to be done must be considered as done.

If it had not been for the locality, estates in Middlesex and Hampshire, no doubt could have arisen; but then follows, as elsewhere, which is the most comprehensive word he could have used.

It is said the lands do not lie anywhere, for they are not yet purchased.

When people make such descriptions as the testator had done here, they intend to pass everything they have in the world; now the money is somewhere, and that by the transmutation of this court is changed into land.

Money is, in England, like *bona notabilia* in the ecclesiastical court, which must be either in the diocese of the bishop where the person dies, or in the diocese of the metropolitan, if he was possessed of money in different places; so here it is either in money or a mortgage, and therefore the word elsewhere certainly takes it in.

Then I must consider it as laid out in one or the other; Linguen *v.* Souray is a case in point, for there was as much an objection upon the locality as in the present.[1]

I declare that the £2,800 and £4,000 under the articles ought to be laid out in the purchase of lands of inheritance, or in church and leasehold; for if there had been only a general devise of his lands this money would certainly have passed.[2]

LAWES *v.* BENNET.

IN CHANCERY, BEFORE SIR LLOYD KENYON, M. R., 1785.

[1 *Cox Equity* 166.]

Thomas Witterwronge, seised in fee of a farm called Bentley, demised the same to one Douglas for a period of seven years from Oct. 2, 1758. Upon the back of the indenture was indorsed a memorandum giving to Douglas the option of purchasing any time between Sept. 29, 1761, and Sept. 29, 1765. Under date of Sept. 1, 1761, Witterwronge made his will, by which he left all his real property to his cousin John Bennet, and his personal property to Bennet and Bennet's sister Mary, who, with her husband, is plaintiff. Witterwronge died in June, 1763, and the personal estate was divided between John Bennet and the plaintiff, both signing and allowing the account between them. John Bennet died in 1779, leaving the defendant, his widow, executrix. Douglas assigned his rights under the contract of lease to one Waller who exercised the option of purchase on Feb. 2, 1765. Bennet and Douglas executed deeds of lease and release according to the agreement. The plaintiff now sues for her

[1] By marriage articles £700, being the wife's portion, together with £700 to be added to it by the husband, was agreed to be laid out in the purchase of lands, to be settled in strict settlement, with remainder in the usual form to the heirs of the husband; before any purchase made the husband dies without issue, having first devised his personal estate, which was of greater value than the £1,400, but without taking notice of it, to his wife, and his real estate to his two nephews, one of whom was his heir at law, this money shall in a court of equity be looked upon as land, and the devise to the wife, which was of greater value, as a satisfaction thereof. Prec. in Ch. 400.

[2] Accord Knights *v.* Atkyns, 1686, 2 Vernon 20; see also Annand *v.* Honeywood, 1685, 1 Vernon 345.

moiety of the purchase money, on the theory that it was part of the personal estate of Witterwronge. And this was the single question in the cause, whether the premises being part of the testator's real estate at the time of his death, but sold afterwards under the circumstances aforesaid, the purchase money should be considered as part of the real or personal estate of the testator.[1]

Master of the Rolls.—Although this case may be new in species, yet the principles upon which it seems to me to depend are perfectly clear, and are so well established in this court, that if I am wrong it must be by misapplication of those principles. No stress can be laid upon the will of Witterwronge, for that is expressed in very general terms. He had two species of property, one of which he gives to Bennet, the other to Bennet and his sister. Then which kind of property is the present? It is very clear that if a man seized of a real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of Douglas whether it shall be real or personal. It seems to me to make no distinction at all. Suppose a man should bargain for the sale of timber, provided the buyer should give proper security for the payment of the money. This when cut down would be part of the personal estate, although it depends upon the buyer whether he gives security or not; (as to what has been said about Douglas' being able to release his power of election, I think a court of equity would relieve against that, if it appeared to be done collusively to oust the legatee of his personal estate) when the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period. The case of Bowes *v.* Lord Shrewsbury, 5 Bro. Parl. Ca. 260, shows the nature of the property may be altered otherwise than by the act of the original owner, although that was altered by the act of the legislature, and not of any third person: but it shows generally that there is no impossibility in the nature of the thing. As to the length of the time, I think I can take no notice of it in this case, for here there is no pretence to presume the demand satisfied. On the contrary, it has been withholden for another reason. I must therefore declare this £3000 to be part of the personal estate of the testator, and that the plaintiffs are entitled to one moiety thereof, and the Master must inquire whether the plaintiff Thomas has made any, and what settlement on the plaintiff Mary, etc. And as to interest, as it appears that Bennet laid out this money in the funds, and consequently has made interest of it; he must be answerable for interest, from 1st February, at 4 per cent.[2]

[1] The statement of facts is abridged and the arguments of counsel are omitted.

[2] Accord Townley *v.* Bedwell, 1808, 14 Ves. 590; *In re* Isaacs, 1894, 3 Ch. 506; where an intestate had entered into contract for the purchase of real

EDWARDS *v.* WEST.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION, 1878.

[*Law Reports, 7 Chancery* 858.]

FRY, J.:—The Plaintiffs in this case allege that the option of purchase which was given by the lease of the 29th of September, 1870, to be exercised by a notion given on or before the 25th of March, 1875, and to be carried into completion on or before the 29th of September, 1875, was enlarged by subsequent correspondence, that by virtue of that correspondence a new contract was constituted under which the 29th of September, 1876, was substituted for the 25th of March, 1875, and that the option was exercised on the 28th of September.

I will assume, for the purpose of the present judgment, that the Plaintiffs are correct in that contention. There are, therefore, four dates material to consider; first, that of the contract creating the option; secondly, that of the injury to the premises; thirdly, that for the exercise of the option; and fourthly, that for the completion of the purchase according to that option.

Now the point which I am about to decide arises from the payment of a sum of between £11,000 and £12,000 by the insurance offices to the Defendant consequent upon the injury to the property by fire on the 6th of May, 1876. The Plaintiffs contend that that money so received by the Defendant was received by him as part payment of the £14,000, which the Plaintiffs, under the option, were bound to pay; and that contention has been supported by three methods of argument.

In the first place, it has been said that by the law of England the exercise of the option causes it to relate back to the time of the creation of the option in such a manner as to render the property for this purpose property of the purchaser as from the date of the contract which gave the option; so that here, although the option was given by a contract made in April, and not exercised till the 28th of September, yet that when it was so exercised on the 28th of September, it operated retrospectively, and made the property the property of the purchaser as from the month of April preceding, and consequently made the vendor trustee of the fruits

estate, which the vendee had rescinded under a power reserved to him, it has been held that the heir of the testator was entitled to the purchase money, Hudson *v.* Cook, 1870, L. R. 13 Eq. 417; see also Kerr *v.* Day, 1850, 14 Pa. St. 112; but in some of the United States it has been held that the conversion does not relate back, Smith *v.* Loewenstein, 1893, 50 Ohio State 346; where specific performance is refused because of the laches of testator's heir, it has been held that the conversion will be sustained, the property is sold by the court and the proceeds divided according to the statute of distribution, Keep *v.* Miller, 1886, 42 N. J. Eq. 100.

of the property for the purchaser. Now it appears to me that such a conclusion would be highly inconvenient, because it would place a person under the obligations which rest upon a trustee, or make him free from them, by reference to an act which was not performed until a future day; and the retrospective conversion of a person into a trustee of property is a result eminently inconvenient. In the next place, the argument appears to me to be opposed to the general course of authority and principle. According to the view which I conceive to be true, the conversion of property, which means the treating it as belonging to somebody else before it has been actually transferred to that other person, results from a contract which can be specifically enforced; so that where there is no specific performance of contract possible, there is no conversion. It flows in effect from the principle of equity which considers that done which ought to be done, and which the Court can compel to be done, and it extends so far back as those circumstances exist, and no farther. In other words, where there is a contract capable of being specifically enforced as from the date of that contract, and neither earlier nor later, the property comprised in the contract is deemed to belong to the purchaser, and the money to be paid is deemed to belong to the vendor, because those two things ought to be done; but here there is no obligation to do them at any earlier date than that of the contract constituted by the exercise of the option. The conversion cannot, according to the principle, relate back to an earlier date than the contract which gives rise to it. I refer to the case of Haynes *v.* Haynes, 1 Dr. & Sm. 426, as an authority for that general principle, and it appears to be important.

Upon that general principle, then, I should hold that the argument is untenable. But, then, I am told that the case is covered by authority, and for that purpose my attention is very properly drawn to the cases which begin with Lawes *v.* Bennet, 1 Cox, 167, and which shew that where there is a contract giving an option to purchase real estate, and the option is not exercised till after the death of the person who created the option, nevertheless the produce of the sale goes as part of his personal estate, and not as part of his real estate. Now, whether Lawes *v.* Bennet is or is not consistent with the general principle upon which conversion has been held to exist, it is not for me to say. It is enough for me to say that the case has been followed in numerous other cases, though it has been observed upon by more than one Judge as somewhat difficult of explanation. I think that the language of Lord ELDON in Townley *v.* Bedwell, 14 Ves. 591, and of Vice-Chancellor KINDERSLEY in Collingwood *v.* Rew, 3 Jur., N. S., 785, shews that they were not satisfied that that case was consistent with the general principles which were applicable to cases of conversion; and therefore, although I should implicitly follow Lawes *v.* Bennet in a case between the real and personal representatives of the person who granted the option, I do not think that I am at liberty to extend it so as to imply that there is conversion from the date of the contract giving the option as between the vendor and the purchaser who

claim under it. It is to be borne in mind that no authority can be produced which has extended the doctrine of Lawes *v.* Bennet in the slightest degree beyond what was decided in that case. The principle, whatever it be, has never been applied except as between the real and the personal representatives of the original creator of the option, and I for one shall not extend it, because I think that it is limited by the general principle to which I have adverted. Therefore, upon that ground, I hold that there is no conversion of the estate from an earlier date than the 28th of September, when the notice was given. The fire having taken place, and the insurance money having been received at an earlier date, the intended purchaser has no right, upon the general principles of conversion, to assert a title to that money.[1]

FLETCHER *v.* ASHBURNER.

IN CHANCERY BEFORE SIR THOMAS SEWELL, M. R., 1779.

[1 *Brown's Chancery* 497.]

John Fletcher, by his will, devised his burgage houses and free rents in Kendal, and all his personal estate to trustees and the survivor, and the heirs, executors, and administrators of such survivor, in trust, to sell so much as should be sufficient to pay his debts, and then to permit his wife Agnes to enjoy the residue during her life, if she so long continued his chaste widow; and after her decease to sell and dispose thereof, and the money arising thereby, after deducting charges, and half a guinea each to the trustees for their trouble, to pay to and between his son William and daughter Mary, share and share alike; provided that if his

[1] For further cases on this doctrine in its relation to specific performance see Vol. II, Specific Performance, Section 3.

Time of conversion by will. "Whether the conversion takes place at the death of the testator or at some later period, depends upon the intention of the testator. If the will, in terms, provides for a sale at a specified future time, or creates a trust with the direction to sell only on the happening of a designated event, which might or might not happen, then the conversion takes place in its occurrence, otherwise the conversion will be deemed to take place as of the date of testator's death." Per PARKER, J., in Mutual Life Insurance Co. *v.* Bailey, 1897, 19 N. Y. App. Div. 204, 206.

"In the will under consideration a power to sell, mortgage or convey any or all of the real estate is given. It is not directed or commanded to be done. It is left entirely discretionary with the executor or trustee whether the sale shall be made or not. . . . It follows that there was no conversion until the executor exercised the power and consummated the sale." Per HAIGHT, J., in Clift *v.* Moses, 1889, 116 N. Y. 144, 158.

wife should happen to marry again, the trustees should, immediately after the marriage, sell all the estate and effects given to her for her life, and, after such deductions as aforesaid, should pay the remainder of the money to and amongst his wife, his son William, and daughter Mary, share and share alike, equally, and in case either his son William or his daughter Mary should die before his or their legacy should become due, that the share or legacy of him or her so dying should go to the survivor of them: the testator died, leaving Agnes his widow, William his only son and heir at law, and Mary his daughter; Agnes, by the custom of burgage tenure, was entitled to hold the burgage houses in Kendal during her chaste viduity, against the disposition of her husband by will; Mary attained 21, but died unmarried in the life of her mother and brother. William was 21 at the death of the testator, and died without issue in the life of his mother; the mother died, the widow of the testator; upon her death a bill was filed by the heir at law of William and John the testator, against the trustees and the personal representatives of the testator and of the widow, to have a conveyance of the real estates divised by the will to the plaintiff, the heir at law. The representative of the widow, who was the sole next of kin of William the son, by answer claimed the property as personal; alleging, that by the direction to the trustees to sell the real estates they become as personal property, and as such, were to go to the personal representative of William the son who survived his sister.

The cause was heard the 11th December, 1778, where the first objection taken was, that the personal representative of William was not before the Court.

But the Master of the Rolls was of opinion there were sufficient parties to sustain the question; that the personal representative was a mere formal party, and that, if he thought proper to make a decree, a personal representative might be brought before the Master.

In June his Honour gave his opinion, he observed that nothing was better established than this principle: that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given; whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land. The cases established this rule universally. If any difficulty has arisen, it has arisen from special circumstances. In the case of Sweetapple *v.* Bindon, 2 Vern. 536, it was determined that a husband was entitled to money to be laid out in land, as tenant by the courtesy, and although it is held that a wife is not entitled to dower in a similar case, yet it is allowed that it is so held because cases have been determined, and not from any principle.

The cases of land to be turned into money are fewer than those of money to be employed in the purchase of land. The principle cases have been where real estates have been directed to be sold and some part of the disposition has failed; so that something has resulted to the heir at law, as in the case of Emblyn *v.* Freeman, Pre. in Cha. 541, and Cruse *v.* Barley and Banson, 3 P. Wms. 20. These are all cases where a devise has failed, and the thing devised has not accrued to the representative or devisee, but to the heir at law of the testator. The case of Durour *v.* Motteux, 1 Ves. 320, is a strong case to the point now before the Court; and if anything could strengthen the general rule the circumstances of the present case would do so. The testator has blended the real and personal estate together, and disposed of them, without distinction, for the benefit of his wife and children. Both real and personal estate are made one fund. In the case of Durour *v.* Motteux, Lord HARDWICKE made this a principal ground for considering the whole fund as personal estate: in the present case it might be uncertain, till the death of the widow, whether the estates must not be absolutely sold: both the children indeed died before her; but she might have married before the death of one or both. The interests of both the children were vested, subject, as to one of them, to be defeated in case either of them died before the mother. There could be no election to take the fund as land or money; for where an estate is directed to be sold, and the money divided amongst several persons, none has a right to say that any part shall not be sold; the question is therefore merely between the real and personal representatives of the son, whether the personal representative shall take the fund as personal property, according to the will, or the heir at law shall take it as if no will had been made. The case of Flanagan *v.* Flanagan, is a strong authority that it shall be taken as personal estate, according to the will. In that case the testatrix, Sarah Wooley, by will, dated 28th March, 1749, gave and devised all her real and personal estates to Francis Plumtree, in trust, in the first place, out of her personal estate, as far as it would extend, and in the next place, by sale of her real estate, or a sufficient part thereof, to raise so much money as should be sufficient to pay her debts and legacies; and after payment thereof, in trust to convey the residue of the real estate, which should remain unsold, and pay the produce of such part as should be sold, and all other the residue of her real estates, between her father James Flanagan and her brother James Flanagan, their heirs, executors and administrators, equally. A bill was brought by the creditors for sale of the real estate, to supply the deficiency of the personal estate for payment of debts; and a decree was made for a sale; and if any of the money to arise by the sale should remain after payment of the debts and legacies, it was directed to be paid to James Flanagan the father and James Flanagan the son, equally; and if any estate should remain unsold, the trustees were directed to convey it to them and their heirs, equally: after the decree James Flanagan the son died, leaving a daughter, and a son born after

his death; part of the estate was sold, and afterwards James Flanagan the grandfather died, leaving his grandson his heir, and his grandson and granddaughter his sole next of kin: after the death of the grandfather a further part of the estate was sold, under an apprehension that the produce of the first sale was insufficient to pay the debts and legacies: it appeared however that the produce of the first sale was sufficient. A bill was afterwards brought by the son of James Flanagan the son, claiming a moiety of the surplus, as the real estate of James Flanagan his grandfather, to whom he was become heir, against the personal representative of his grandfather, and against the daughter of James Flanagan the son, who claimed a moiety as one of the next of kin of her grandfather. It was objected, that the second sale, after the death of the grandfather, was improper. The Court determined, that the second sale, actually made under the decree of the Court, before the Master, could not be considered as improperly made: that there was no fraud, no practice, and that the money ought to go to the personal representative of the grandfather. The case of Digby *v.* Legard is a different question. There the testatrix (Elizabeth Byerley) directed her real estates to be sold to pay debts and legacies, and gave the residue to five persons, to be equally divided between them, one of whom (Lady Cayley) died in her lifetime. It was resolved that the devise, so far, failed totally, and should accrue to the heir at law. The language of the decree is such that the benefit of the devise to Lady Cayley should accrue to the testatrix's heir at law, Mr. Jorvoice, who was a lunatic, and should be paid to his committee, as real estate descended to him. The case of Scudamore *v.* Scudamore, Pre. in Cha. 543, shews that, in all cases where the dispute is between representatives, the heir or executor shall have the fund, according to the will or contract of the persons who gave or created it. There was a case of Ogle *v.* Cook, heard 19th February, 1748, which was this: Mr. Ogle made his will in 1744, and gave his real estate to trustees to sell, and to vest the money in stock, and pay the interest to his wife during her widowhood, and after her death, or marriage, to his two daughters equally, except that the eldest was to have £1,000 more than the other: he gave the residue of his personal estate in the same way: he afterwards conveyed the real estate to one of the trustees named in his will, to whom he was considerably indebted, in trust, to sell so much as should be necessary to pay the debt, and as to the residue, in trust, for Mrs. Ogle: part of the estate was sold, and then Mr. Ogle died. His youngest daughter died in his lifetime. The bill was brought by the widow and the eldest daughter against the son, who was the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the youngest daughter, as personal estate of Mr. Ogle, to be divided between them and the son as his next of kin. The son insisted the conveyance to the trustee was a revocation of the will; and, if not, that the share of the dead daughter was to be considered as real estate of Mr. Ogle, and descended to him as heir. It was determined that the

conveyance was a revocation only *pro tanto,* to let in the debt; and that so much of the estate as remained unsold should be sold, and that the money raised or to be raised by sale of the estate made part of the personal estate of Mr. Ogle. There was another case about the same time, which is in 1 Ves. 174. Cunningham *v.* Moody, where, by marriage articles, £500 was agreed to be laid out in purchase of lands, to be settled to the use of the husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the wife for life, with remainder to the children of the marriage, as the husband and wife should appoint; and in default of a joint appointment as the survivor should appoint; and in default of any appointment to the children, to be equally divided among them; if more than one, as tenants in common, in tail general, with cross remainders; and if but one, to that child in tail general, and no appointment was made. The father and mother being dead, and the daughter being married, the trustees paid the £500 to her and her husband, and they received it as money, and executed a release. The daughter had a child which died, and she afterwards died without issue. A daughter of the settlor by a second marriage filed a bill against the husband, representative of his wife, the daughter by the first marriage, for the £500, considering it as land; and it was observed that she was entitled to the money, but that the husband of her deceased sister was entitled to the interest during his life, as tenant by the courtesy. In the present case, William Fletcher the son had the whole beneficial title vested in him as money, subject to his mother's interest for life or widowhood. She was his sole next of kin, and her personal representatives are now entitled to the estate as money; the bill must therefore be dismissed without costs.[1]

[1] In Cruse *v.* Barley, 1727, 3 P. Wms. 20, one Bauson had two sons, Christopher and Cecil, and three daughters. He devised his lands to be sold to pay his debts; and of the proceeds, after debts paid, he gives £200 to his eldest son, Christopher, at twenty-one, the residue to his four younger children equally. Christopher died unmarried, under twenty-one. The debts of the testator were considerable and the estate small. The bill was brought by the creditors against Cecil, the only surviving son and heir at law of the testator, to prove the will equity, and to have a decree for the sale of the estate. "The Master of the Rolls (Sir JOSEPH JEKYLL) ordered precedents to be looked into, saying he would consider of it; and at length declared his opinion that the £200 should be construed as land, and descend to the heir; for that it is the same as if so much land as was of the value of £200 was not directed to be sold, but suffered to descend."

To this case Mr. Cox appended the following note:

"The several cases on this subject seem to depend upon this question, whether the testator meant to give to the produce of the real estate the quality of personalty to all intents, or only so far as respected the particular purposes of the will; for unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personalty for the purposes of the will, but, further, that the produce of the real estate shall be taken as

CRAIG *v.* LESLIE.

IN THE SUPREME COURT OF THE UNITED STATES, 1818.

[3 *Wheaton* 563.]

This was a case certified from the circuit court for the district of Virginia, in which the opinions of the judges of that court were opposed on the following question, viz. Whether the legacy given to Thomas Craig, an alien, in the will of Robert Craig, is to be considered as a devise, which he can take only for the benefit of the commonwealth, and cannot hold; or a bequest of a personal chattel, which he could take for his own benefit?

This question grows out of the will of Robert Craig, a citizen of Virginia, and arose in a suit brought on the equity side of the circuit court for the district of Virginia, by Thomas Craig, against the trustees named in the will of said Robert Craig, to compel the said trustee to execute the trusts, by selling the trust fund, and paying over the proceeds of the same to the complainant.

The clause in the will of Robert Craig, upon which the question arises, is expressed in the following terms, viz. "In the first place, I

personalty, whether such purposes take effect or not, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will at the time of the testator's death (whether from the silence or the inefficacy of the will itself or from subsequent lapse) will result to the heir. Randall *v.* Bookey, Pre. Cha. 162; Emblyn *v.* Freeman, Pre. Cha. 541; Cruse *v.* Barley, sup. Stonehouse *v.* Evelyn, post. 252; Arnold *v.* Chapman, 1 Ves. 108; Digby *v.* Legard, before Lord BATHURST, Trin. Term, 1774, where E. B. devised her real and personal estate to trustees in trust to sell, to pay debts and legacies, and to pay the residue to five persons, to be equally divided between them, share and share alike. One of the residuary legatees died in the lifetime of testatrix. The Court at the hearing, and afterwards upon a rehearing, held that this was a resulting trust, as to the share in the real estate of the residuary legatee who died in the testatrix's lifetime, for the benefit of the heir at law. Reg. Lib. A., 1773, fol. 495, and 1774, fol. 325; Akroyd *v.* Smithson, before Lord THURLOW, March 4, 1780. Christopher Holdsworth, by will, gave several pecuniary legacies, and then devised all his real and personal estate to trustees in trust to sell the same and to convert the same and every part thereof into ready money, and out of the produce to pay his debts and the above-mentioned legacies, and to pay the surplus, if any, unto the said several legatees in proportion to their respective legacies. Two of the legatees died in the lifetime of the testator. Lord Chancellor approved of the case of Digby *v.* Legard, and declared that the shares in the real estate of the two residuary legatees who died in the testator's lifetime resulted to the heir at law. Reg. Lib. A, 1779, fol. 668, and 1 Bro. Ch. Rep. 503; S. C. Robinson *v.* Taylor, 2 Bro. Cha. Rep. 589; Spink *v.* Lewis, 3 Bro. Cha. Rep. 355. The only case which appears inconsistent with these decisions is that of Ogle *v.* Cook, cited, 1 Bro. Cha. Rep. 501. In the cases of Mallabar *v.* Mallabar, Ca. temp. Tal. 79, and Durour

give, devise, and bequeath unto John Leslie," and four others, "all my estate, real and personal, of which I may die seized or possessed, in any part of America, in special trust, that the afore-mentioned persons, or such of them as may be living at my death, will sell my personal estate to the highest bidder, on two years credit, and my real estate on one, two, and three years credit, provided satisfactory security be given, by bond and deed of trust. In the second place, I give and bequeath to my brother, Thomas Craig, of Beith parish, Ayrshire, Scotland, all the proceeds of my estate, both real and personal, which I have herein directed to be sold, to be remitted unto him accordingly as the payments are made, and I hereby declare the aforesaid John Leslie," and the four other persons, "to be my trustees and executors for the purposes aforementioned."

The attorney-general of Virginia, on behalf of that State, filed a cross bill against the plaintiff in the original suit, and the trustee; the prayer of which is to compel the trustee to sell the trust estate, so far as it consists of real estate, and to appropriate the proceeds to the use of the said commonwealth, by paying the same into its public treasury.

The will of Robert Craig was proved in June, 1811, and the present suit was instituted some time in the year 1815.

Mr. Justice WASHINGTON delivered the opinion of the court. The in-

v. Motteux, 1 Ves. 320, the question was between the heir at law and the residuary legatee of the personal estate, and not the next of kin, and in those cases the Court was of opinion that upon the construction of the will the real estate was converted into personalty for all the purposes of the will, including the residuary bequest. These cases consequently do not decide the question, which would have arisen if there had been no residuary disposition, or if such residuary disposition had been confined to what was personalty at the testator's death. But notwithstanding that such interest results to the heir, as being part of the produce of the real estate undisposed of, it may yet be personal estate of the heir and pass as such by a residuary bequest. Hewitt *v.* Wright, 1 Bro. Cha. Rep. 90. Another branch of cases are those in which the question has arisen between the real and personal representatives of devisees under wills of the nature above mentioned. Vide Scudamore *v.* Scudamore, Pre. Cha. 543; Flanagan *v.* Flanagan, cited, 1 Bro. Cha. Rep. 513; Fletcher *v.* Ashburner, 1 Bro. Cha. Ca. 497."

In Hereford *v.* Ravenhill, 1839, 1 Beav. 481, a testator directed his trustees to invest his personal estate as soon after his death as a convenient purchaser could be found, in real estate, and settle it according to certain limitations. These inclinations having become exhausted before the personal estate had been invested, the question arose as to whom the fund belonged. The heir at law had not been made a party. Lord LANGDALE, Master of the Rolls, said "he was of opinion that the heir at law was not a necessary party, because it had been decided in the case referred to that where a testator directed his personal estate to be converted into real estate for several purposes, some of which failed, his heir was not, after satisfying the purposes which could take effect, entitled to the personalty as being impressed with the character of real estate."

capacity of an alien to take, and to hold beneficially, a legal or equitable estate in real property, is not disputed by the counsel for the plaintiff; and it is admitted by the counsel for the State of Virginia, that this incapacity does not extend to personal estate. The only inquiry, then, which this court has to make is, whether the above clause in the will of Robert Craig is to be construed, under all the circumstances of this case, as a bequest to Thomas Craig of personal property, or as a devise of the land itself?

Were this a new question, it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine, that a devise of money, the proceeds of land directed to be sold, is a devise of money, notwithstanding it is to arise out of land; and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made.

The settled doctrine of the courts of equity correspond with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. In the case of Fletcher *v.* Ashburner, 1 Bro. Ch. Cas. 497, the master of the rolls says, that "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given." He adds, "the owner of the fund, or the contracting parties, may make land money, or money land. The cases establish this rule universally." This declaration is well warranted by the cases to which the master of the rolls refers, as well as by many others. See Dougherty *v.* Bull, 2 P. Wms. 320;[1] Yeates *v.* Compton, id. 358; Trelawney *v.* Booth, 2 Atk. 307.

The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms

[1] "This case is entirely covered by the decision in Dougherty *v.* Bull, 2 P. Wms. 320. There the testator devised lands to trustees in fee, in trust to apply the profits until sale for the benefit of all his four children and the survivors and survivor of them equally, and on further trust as soon as the trustees should see necessary for the benefit of the children, they should sell the premises and apply the money for the benefit of his four children equally, to be paid at twenty-one or marriage. A, the eldest of the four children, attained twenty-one and married, and died without issue, intestate, leaving a wife. The Lord Chancellor (Lord KING), confirming the decision of the Master of the Rolls, decreed that the land, being in all events devised to be sold, though the time for sale was left to the executors, was personal estate, and A's widow must have a moiety of A's share; and the profits of the land until sale must go as the money arising upon sale would. In this case the words are in all respects similar to those in Dougherty *v.* Bull." Per PEARSON, J., in Morris *v.* Griffiths, 1884, L. R. 26 Ch. Div. 601.

and circumstances of agreements and other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity.

Thus, where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust,* but will permit him to take the money or the land, if he elect to do so before the conversion has actually been made; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest.

If this election be not made in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. So that in case of the death of the *cestui que trust,* without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done had the trust been executed, and the conversion actually made in his lifetime.

In the case of Kirkman *v.* Mills, 13 Ves., which was a devise of real estate to trustees upon trust to sell, and the moneys arising, as well as the rents and profits till the sale, to be equally divided between the testator's three daughters, A. B. and C. The estate was, upon the death of A. B. and C., considered and treated as personal property, notwithstanding the *cestui que trusts,* after the death of the testator, had entered upon, and occupied the land for about two years prior to their deaths; but no steps had been taken by them, or by the trustees, to sell, nor had any requisition to that effect been made by the former to the latter. The master of the rolls was of opinion, that the occupation of the land for two years was too short to presume an election. He adds, "the opinion of Lord Rosslyn, that property was to be taken as it happened to be at the death of the party from whom the representative claims, had been much doubted by Lord Eldon, who held, that without some act, it must be considered as being in the state in which it ought to be; and that Lord Rosslyn's rule was new, and not according to the prior cases."

The same doctrine is laid down and maintained in the case of Edwards *v.* The Countess of Warwick, 2 P. Wms. 171, which was a covenant on marriage to invest £10,000, part of the lady's fortune, in the purchase of land in fee, to be settled on the husband for life, remainder to his first and every other son in tail male, remainder to the

husband in fee. The only son of this marriage having died without issue, and intestate, and the investment of the money not having been made during his life, the chancellor decided that the money passed to the heir at law; that it was in the election of the son to have made this money, or to have disposed of it as such, and that, therefore, even his parol disposition of it would have been regarded; but that something to determine the election must be done.

This doctrine, so well established by the cases which have been referred to, and by many others which it is unnecessary to mention, seems to be conclusive upon the question which this court is called upon to decide, and would render any farther investigation of it useless, were it not for the case of Roper *v.* Radcliffe, which was cited, and mainly relied upon, by the counsel for the State of Virginia.

The short statement of that case is as follows: John Roper conveyed all his lands to trustees and their heirs, in trust, to sell the same, and out of the proceeds, and of the rents and profits till sale, to pay certain debts, and the overplus of the money to be paid as he, the said John Roper, by his will or otherwise should appoint, and for want of such appointment, for the benefit of the said John Roper, and his heirs. By his will reciting the said deed, and the power reserved to him in the surplus of the said real estate, he bequeathed several pecuniary legacies, and then gave the residue of his real and personal estate to William Constable and Thomas Radcliffe, and two others, and to their heirs. By a codicil to this will, he bequeathed other pecuniary legacies; and the remainder, whether in lands or personal estate, he gave to the said W. C. and T. R.

Upon a bill filed by W. C. and T. R. against the heir at law of John Roper, and the other trustees, praying to have the trust executed, and the residue of the money arising from the sale of the lands to be paid over to them; the heir at law opposed the execution of the trust, and claimed the land as a resulting trust, upon the ground of the incapacity of Constable and Radcliffe to take, they being papists. The decree of the court of chancery, which was in favour of the papists, was, upon appeal to the House of Lords, reversed, and the title of the heir at law sustained; six judges against five, being in his favour.

Without stating at large the opinion upon which the reversal took place, this court will proceed, 1. To examine the general principles laid down in that opinion; and then, 2. The case itself, so far as it has been pressed upon us as an authority to rule the question before the court.

In performing the first part of this undertaking, it will not be necessary to question any one of the premises laid down in that opinion. They are, 1. That land devised to trustees, to sell for payment of debts and legacies, is to be deemed as money. This is the general doctrine established by all the cases referred to in the preceding part of this opinion. 2. That the heir at law has a resulting trust in such land, so far as it is of value, after the debts and legacies are paid, and that he

may come into equity and restrain the trustee from selling more than is necessary to pay the debt and legacies; or he may offer to pay them himself, and pray to have a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property will, in either case, be land, and not money. This right to call for a conveyance is very correctly styled a privilege, and it is one which a court of equity will never refuse, unless there are strong reasons for refusing it. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted into money, for the purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will, (whether it arise from some omission or defect in the will itself, or from any subsequent accident, which prevents the devise from taking effect) results to the heir at law, as the old use not disposed of. Such was the case of Crewe *v.* Bailey, 3 P. Wms. 20, where the testator having two sons, A. and B., and three daughters, devised his lands to be sold to pay his debts, etc., and as to the moneys arising by the sale, after debts paid, gave £200 to A. the eldest son, at the age of 21, and the residue to his four younger children. A. died before the age of 21, in consequence of which the bequest to him failed to take effect. The court decided that the £200 should be considered as land to descend to the heir at law of the testator, because it was, in effect, the same as if so much land as was of the value of £200 was not directed to be sold, but was suffered to descend. The case of Ackroyd *v.* Smithson, 1 Bro. Ch. Cas. 503, is one of the same kind, and establishes the same principle. So, likewise, a money provision under a marriage contract, to arise out of land, which did not take effect, on account of the death of the party for whose benefit it was intended, before the time prescribed, resulted as money to the grantor, so as to pass under a residuary clause in his will. Hewitt *v.* Wright, 1 Bro. Ch. Cas. 86.

But even in cases of resulting trusts, for the benefit of the heir at law, it is settled that if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold, the quality of personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal. This was decided in the case of Yeates *v.* Compton, 2 P. Wms. 30, in which the chancellor says, that the intention of the will was to give away all from the heir, and to turn the land into personal estate, and that this was to be taken as it was at the testator's death, and ought not to be altered by any subsequent accident, and decreed the heir to join in the sale of the land, and the money arising therefrom to be paid over as personal estate to the representatives of the annuitant, and to those of the residuary legatee. In the case of Fletcher *v.* Ashburner, before referred to, the suit was brought by the heir at law of the testator, against the personal representatives and the trustees claiming the estate upon the ground of a resulting trust. But the court decreed the property, as money, to

the personal representatives of him to whom the beneficial interest in the money was bequeathed, and the master of the rolls observes, that the cases of Emblyn *v.* Freeman, and Crewe *v.* Bailey, are those where real estate being directed to be sold, some part of the disposition has failed, and the thing devised has not accrued to the representative, or devisee, by which something has resulted to the heir at law.

It is evident, therefore, from a view of the above cases, that the title of the heir to a resulting trust can never arise, except when something is left undisposed of, either by some defect in the will, or by some subsequent lapse, which prevents the devise from taking effect; and not even then, if it appears that the intention of the testator was to change the nature of the estate from land to money, absolutely and entirely, and not merely to serve the purposes of the will. But the ground upon which the title of the heir rests is, that whatever is not disposed of remains to him, and partakes of the old use, as if it had not been directed to be sold.

The third proposition laid down in the case of Roper *v.* Radcliffe, is, that equity will extend the same privilege to the residuary legatee which is allowed to the heir, to pay the debts and legacies, and call for a conveyance of the real estate, or to restrain the trustees from selling more than is necessary to pay the debts and legacies.

This has, in effect, been admitted in the preceeding part of this opinion; because, if the *cestui que trust*, of the whole beneficial interest in the money to arise from the sale of the land, may claim this privilege, it follows, necessarily, that the residuary legatee may, because he is, in effect, the beneficial owner of the whole, charged with the debts and legacies, from which he will be permitted to discharge it, by paying the debts and legacies, or may claim so much of the real estate as may not be necessary for that purpose.

But the court cannot accede to the conclusion, which in Roper *v.* Radcliffe, is deduced from the establishment of the above principles. That conclusion is, that in respect to the residuary legatee, such a devise shall be deemed as land in equity, though in respect to the creditors and specific legatees it is deemed as money. It is admitted, with this qualification, that, if the residuary legatee thinks proper to avail himself of the privilege of taking it as land, by making an election in his lifetime, the property will then assume the character of land. But if he does not make this election, the property retains its character of personalty to every intent and purpose. The cases before cited seem to the court to be conclusive upon this point; and none were referred to, or have come under the view of the court, which sanction the conclusion made in the unqualified terms used in the case of Roper *v.* Radcliffe.

As to the idea that the character of the estate is affected by this right of election, whether the right be claimed or not, it appears to be as repugnant to reason, as we think it has been shown to be, to principle and authorities. Before anything can be made of the proposition,

it should be shown that this right or privilege of election is so indissolubly united with the devise, as to constitute a part of it, and that it may be exercised in all cases, and under all circumstances. This was, indeed, contended for with great ingenuity and abilities by the counsel for the state of Virginia, but it was not proved to the satisfaction of the court.

It certainly is not true, that equity will extend this privilege in all cases to the *cestui que trust.* It will be refused if he be an infant. In the case of Seeley *v.* Jago, 1 P. Wms. 389, where money was devised to be laid out in land in fee, to be settled on A. B. and C., and their heirs, equally to be divided. On the death of A., his infant heir, together with B. and C., filed their bill claiming to have the money, which was decreed accordingly as to B. and C.; but the share of the infant was ordered to be put out for his benefit; and the reason assigned was, that he was incapable of making an election, and that such election, if permitted, would, in case of his death, be prejudicial to his heir.

In the case of Foone *v.* Blount, Cowp. 467, Lord MANSFIELD, who is compelled to acknowledge the authority of Roper *v.* Radcliffe in parallel cases, combats the reasoning of Chief Justice PARKER upon this doctrine of election, with irresistible force. He suggests, as the true answer to it, that though in a variety of cases this right exists, yet it was inapplicable to the case of a person who was disabled by law from taking land, and that therefore a court of equity would, in such a case, decree that he should take the property as money.

The case of Walker *v.* Denne, (2 Ves. Jun. 170.) seems to apply with great force to this part of our subject. The testator directed money to be laid out in lands, tenements, and hereditaments, or on long terms, with limitations applicable to real estate. The money not having been laid out, the crown, on failure of heirs, claimed the money as land. It was decided that the crown had no equity against the next of kin to have the money laid out in real estate in order to claim it by escheat. It was added, that the devisees, on becoming absolutely entitled, have the option given by the will; and a deed of appointment by one of the *cestui que trusts,* though a *feme covert,* was held a sufficient indication of her intention that it should continue personal, against her heir claiming it as ineffectually disposed of for want of her examination. This case is peculiarly strong, from the circumstance, that the election is embodied in the devise itself; but this was not enough, because the crown had no equity to force an election to be made for the purpose of producing an escheat.

Equity would surely proceed contrary to its regular course, and the principles which universally govern it, to allow the right of election where it is desired, and can be lawfully made, and yet refuse to decree the money upon the application of the alien, upon no other reason, but because, by law, he is incapable to hold the land: In short, to consider

him in the same situation as if he had made an election, which would have been refused had he asked for a conveyance. The more just and correct rule would seem to be, that where the *cestui que trust* is incapable to take or to hold the land beneficially, the right of election does not exist, and, consequently, that the property is to be considered as being of that species into which it is directed to be converted.

Having made these observations upon the principles laid down in the case of Roper *v.* Radcliffe, and upon the arguments urged at the bar in support of them, very few words will suffice to show that, as an authority, it is inapplicable to this case.

The incapacities of a papist under the English statute of 11 and 12 Wm. III. c. 4, and of an alien at common law, are extremely dissimilar. The former is incapable to take by purchase, any lands, or profits out of lands; and all estates, terms, and any other interests or profits whatsoever out of lands, to be made, suffered, or done, to, or for the use of such person, or upon any trust for him, or to, or for the benefit, or relief of any such person, are declared by the statute to be utterly void.

Thus, it appears that he cannot even take. His incapacity is not confined to land, but to any profit, interest, benefit, or relief, in or out of it. He is not only disabled from taking or having the benefit of any such interest, but the will or deed itself, which attempts to pass it, is void. In Roper *v.* Radcliffe, it was strongly insisted, that the money given to the papist, which was to be the proceeds of the land, was a profit or interest out of the land. If this can be so, (and it is not material in this case to affirm or deny that position) then the will of John Roper in relation to the bequest to the two papists was void under the statute; and if so, the right of the heir at law of the testator, to the residue, as a resulting trust, was incontestible. The cases above cited have fully established that principle. In that case, too, the rents and profits, till the sale, would have belonged to the papists, if they were capable of taking, which brought the case still more strongly within the statute; and this was much relied on, not only in reasoning upon the words, but the policy of the statute.

Now, what is the situation of an alien? He can not only take an interest in land, but a freehold interest in the land itself, and may hold it against all the world but the king, and even against him until office found, and he is not accountable for the rents and profits previously received. Vide ante, p. 12, Jackson *ex dem.* State of New York *v.* Clarke, note c. In this case the will being valid, and the alien capable of taking under it, there can be no resulting trust to the heir, and the claim of the State is founded solely upon a supposed equity, to have the land by escheat, as if the alien had, or could upon the principles of a court of equity have elected to take the land instead of the money. The points of difference between the two cases are so striking that it would be a waste of time to notice them in detail.

It may be further observed, that the case of Roper *v.* Radcliffe has

never, in England, been applied to the case of aliens; that its authority has been submitted to with reluctance, and is strictly confined in its application to cases precisely parallel to it. Lord MANSFIELD, in the case of Foone *v.* Blount, speaks of it with marked disapprobation; and we know, that had Lord TREVOR been present, and declared the opinion he had before entertained, the judges would have been equally divided.

The case of the Attorney-General and Lord Weymouth, Ambler, 20, was also pressed upon the court, as strongly supporting that of Roper *v.* Radcliffe, and as bearing upon the present case.

The first of these propositions might be admitted; although it is certain that the mortmain act, upon which that case was decided, is even stronger in its expression than the statute against Papists, and the chancellor so considers it; for, he says, whether the surplus be considered as money or land, it is just the same thing, the statute making void all charges and encumbrances on land, for the benefit of a charity.

But if this case were, in all respects, the same as Roper *v.* Radcliffe, the observations which have been made upon the latter would all apply to it. It may be remarked, however, that in this case, the chancellor avoids expressing any opinion upon the question, whether the money to arise from the sale of the land was to be taken as personalty or land; and, although he mentions the case of Roper *v.* Radcliffe, he adds, that he does not depend upon it, as it was immaterial whether the surplus was to be considered as land or money under the mortmain act.

Upon the whole, we are unanimously of opinion, that the legacy given to Thomas Craig, in the will of Robert Craig, is to be considered as a bequest of personal estate, which he is capable of taking for his own benefit.

Certificate accordingly.[1]

[1] "The practical results of the doctrine of equitable conversion, as applied to the change of real into personal estate, are chiefly these: First, the rents of the estate between the death of the testator and the actual sale go to the party who takes the proceeds; next, a right in the proceeds, which cannot take effect or vest in the party to whom it is given, passes, where the conversion is established, to the personal representative of the devisor—not to his heir; thirdly, where the right has actually vested, but no sale has been made, the personal representative of the party entitled takes, and not his heir; and another consequence also sometimes takes place, that although the heir takes a share which has fallen in, he takes it as money, so that the succession from him is changed. Smith *v.* Claxton, 4 Mad. Rep. 491.

"Very little difficulty attends the first proposition, because it is obvious that if the *corpus* vests in a competent party the income would naturally follow it, where there is nothing to prescribe a different direction. Fitzgerald *v.* Jervoise, 5 Mad. Rep. 22. And whether there is a devise of the legal estate to trustees or only a naked power does not appear to make a difference. Yates *v.* Compton, 2 P. Wms. 308. But as to the next proposition the application of the doctrine is not so easy. The *criteria* which the authorities

ACKROYD *v.* SMITHSON AND OTHERS.

IN CHANCERY, BEFORE LORD CHANCELLOR THURLOW, 1780.

[1 *Brown Chancery,* 503.]

Christopher Holdsworth, by his will, gave (int. al.) to the defendants, Smithson and Ibbetson, £200 in trust to be used in the education of defendant, Mary Bracklebank, then an infant. He also made a number of other bequests in specified amounts to various parties named. His whole estate, real and personal, he left to the defendants Smithson and Ibbetson, they to sell the same for such price as was obtainable, and to pay, out of

upon the subject of conversion furnish are these—whether the will has prescribed a sale absolutely, and at all events—for all purposes, not merely for the purposes of the will—irrespective of all contingencies, and independent of all discretion. If the sale is to be made for a special purpose, or the general purposes of the will, and these purposes fail, conversion does not take effect; if it is to be made on a given event, it depends upon the occurrence of that event; if the disposition is left to the discretion of the grantee of the power, the will is not imperative, and does not convert the estate.

"These principles are to be drawn from the following authorities: Wheldale *v.* Partridge, 5 Vesey, 388; 8 Vesey, 227; Mr. Cox's note to Cruse *v.* Bailey, 3 P. Wms. 22; Digby *v.* Legard, there cited; Fletcher *v.* Ashburner, 1 Br. C. R. 497; Ackroyd *v.* Smithson, Ibid. 509, and Lord ELDON'S celebrated argument in that case; Powell on Devises, by Jarmyn, vol. ii. p. 60; Leigh & Dalzell on Eq. Conversion, p. 50 *et passim;* McLelland *v.* Shaw, 2 Sch. & Lefroy, 538. In Solley *v.* Seymour, Exch. Dec., 1837. Burgess Rep. Law Journal, vol. vii. p. 12, Baron ALDERSON said: 'The principle upon which the court proceeds, is clear. We are to examine the whole will and see whether the explained intention of the testator to be collected therefrom was, that the property should be converted out and out, as it is called; or whether it was given to the trustee upon trust, either to sell or not to sell, as he in his discretion might judge best.' He then shows, that in the case before the court, there was a plain indication of a discretion as to a sale, and the property remained as at the testator's death.

"In the case before me, it is certain that the testator meant to have his whole property of every description converted into money, and as such distributed. His language applies to a division of money. But it is equally certain that the sale was to be made for the purposes of the will. It is not clear that he meant his real estate should be disposed of, if the purposes of the will should fail.

"Supposing every bequest in this will valid—that the residuary legatees were all competent, natural persons—and that one of them had died before the death of the testator, and after the date of the will, it is clear that the heir of the testator would have had the benefit of the lapse, not the personal representative.

"Again, it is equally clear in the case supposed, that although a sale would

the proceeds, all his debts, bequests, legacies, and annuities. If after such payments there remained any surplus, this was to be divided among the various beneficiaries named in his will proportionately to the amount he had first willed them. He then directed that two sums of £250 each should be invested in the names of the trustees, and the interest of the same to be paid to Thackeray and Gaunt, respectively, during their lives, and upon their deaths, the principal to be divided proportionately among

have to take place, to answer the purposes of the will which could be effected, that would not vary the right of the heir, but he would take the proportion of the proceeds representing the interest which had failed.

"It is needless to advert to any other authority than that of Ackroyd *v.* Smithson, 1 Br. C. R. 502. Lord ELDON'S celebrated argument in that case has been the settled test of every decision since. The circumstances were very analogous to the present case. The will gave pecuniary legacies to a number of persons, and after devising the real estate in trust to sell, then gave the overplus in the hands of trustees to the same legatees, in proportion to the several legacies therein bequeathed to them. The will also directed the conversion of real and personal estate into money, and constituted the proceeds of both a blended fund for payment of the charges, legacies and surplus. So far it closely resembled the present devise; and it was stronger against the heir, because there was an express devise to the trustees, sufficient to carry the legal estate from the heirs; while here there is but a power.

"Two of the legatees died before the death of the testator, and Mr. Scott changed the opinion of Lord THURLOW and obtained a decree that the heir at law took the shares which fell in of the proceeds of real estate. See also Hill *v.* Cook, 1 Vea. & B. 173.

"Again, if there had been a portion of the blended fund set apart, and the interest or income of it given to a legatee for life only, with no disposition over, the share which resulted from the real estate would, on the death of the tenant of life, have gone to the heir of the testator, not to a general residuary legatee, or the personal representative. And so, if one of the legatees was to receive his proportion on attaining a certain age, and died after the death of the testator, but before the period fixed, the share as far as derived from real estate would have fallen to the testator's heir. Cruse *v.* Barley, 3 P. Wms. 20. But see Powell on Devises, by Jarmyn, vol. i. p. 98.

"I consider that the rule as stated by Mr. Cox, 3 P. Wms. 23, will be found strictly sanctioned by the authorities. 'The several cases upon this subject seem to depend upon this question, whether the testator meant to give to the produce of real estate, the quality of personalty to all intents, or only so far as respected the particular purposes of the will; for unless the testator has sufficiently declared his intention, not only that the realty should be converted into personalty, for the purposes of the will, but further, that the produce of the real estate shall be taken as personalty, whether such purposes take effect or not, so much of the real estate or the produce thereof as is not effectually disposed of by the will, at the time of the testator's death (whether from the silence or the inefficacy of the will itself, or from subsequent lapse) will result to the heir.' See especially Amphlett *v.* Parke, 2 Russell & Mylne, 221, in which Lord BROUGHAM overruled the decision of the Master of the Rolls, 1 Simons, 275, and held the heir entitled, in a very strong

the beneficiaries. Two of the beneficiaries died in the lifetime of the testator.

The bill was filed by the next of kin of the testator, against the surviving legatees and the heir at law, claiming the legacies given to the deceased legatees, their shares in the overplus, and in the two sums of £250 as lapsed, and become part of the personal estate of the testator.

The cause came on at the Rolls, July 10, 1778, when His Honor Sir THOMAS SEWELL, being of opinion that the surviving legatees took the whole residue, in proportion to their several legacies, dismissed the bill, without costs.

From this decree the plaintiffs appealed to Lord Chancellor; and the cause coming on to be heard before his Lordship.

Mr. Kenyon attempted to support the decree.

Mr. Scott for the heir at law.[1]

case. He says that the rule is exceedingly well stated in a very learned and useful note in the report of Bruse *v.* Barley; that Mr. Cox in that note extracts the sound principle to be collected from all the cases." Per Assistant Vice-Chancellor HOFFMAN, in Wright *v.* Trustees of Meth. Epis. Church, 1839, 1 Hoff. Ch. 202, 218.

"It was argued that when real estate is once converted into money for any purpose it becomes personal for all purposes, and from the time of such conversion will pass as personal property; and the case of Emerson *v.* Cutler, 14 Pick. 108, was cited. But that affords no authority for any such general position. On the contrary, it was the sale of the vested real estate of a minor by her guardian, under license, and it was held—we think rightly—that the proceeds became her personal property. It was not the less her property because she was a minor under guardianship, though that afforded a good reason why she did not conduct the business personally. The estate was hers absolutely, and therefore from the moment of the sale the proceeds, in money or securities, were her property and her chores in action, as owner. The one species of property replaced the other. It is exactly within the authority of William *v.* Hichborn, 4 Mass. 189.

"As a general rule to be deduced from the cases, we think that in case of such conversion of real into personal estate, to stand in place of the real, as more beneficial to the parties, without changing the beneficial destination, the character thus impressed on the money will attach to it until it reaches one who, if it had remained real estate, would take it beneficially—that is, to his own use absolutely, or with a power like that of tenant in tail in possession, to dispose of it absolutely, or make it his own to all purposes, and it will then be his absolutely." Per SHAW, C.J., in Holland *v.* Adams, 1855, 3 Gray 188, 190.

[1] The circumstances attending Lord ELDON'S appearance in Ackroyd *v.* Smithson are admirably set forth in Twiss' "Life of Eldon," 116-120. It appears that young Scott was retained to enter consent for the heir at law, but inasmuch as he believed the heir at law was entitled to the lapsed share, he argued the case. The client felt that he had no case, and while stating "something about young men being obstinate," directed Scott to do as he thought right.

The chancellor reversed the decree, and directed an account to be taken of the personal estate, and the money arising from the sale of the real estate, and that the share of the deceased legatees in the overplus should be divided between the next of kin and the heir; that is, so much of those shares as was constituted of the personal estate to the next of kin, and so much as was made up of the produce of the real estate to the heir. He said that he fully approved the determination in Digby *v.* Legard. That he used to think, when it was necessary for any purposes of the testator's disposition, to convert the land into money, that the undisposed money would be personalty; but the cases fully proved the contrary. It would be too much to say that if all the legatees had died, the heir could, as he certainly might, he said, prevent a sale; and yet to say that because a sale was necessary, the heir should not take the undisposed part of the produce. The heir must stand in the place of the residuary legatees who died, as to the produce of the real estate. He said he approved the distinctions made in behalf of the heir, and decreed as before.[1]

"Competent counsel held against the claim of the heir at law, and judiciously advised the client as follows: 'Do not send good money after bad; let Mr. Scott have a guinea to give consent, and if he will argue, why let him do so, but give him no more.' The young man argued accordingly, with the result that Lord THURLOW took three days to consider, 'and then delivered his judgment in accordance with my speech, and that speech is in print, and has decided all similar questions ever since.'

"At a later period the young man took a brief against his argument in the case of Ackroyd *v.* Smithson, but the celebrated Dunning (Lord ASHBURTON) said: 'Mr. Scott, I have read your argument in that case of Ackroyd *v.* Smithson, and I defy you or any man in England to answer it. I won't hear you.'"

[1] In case of a total failure the *res* remains the same. Edward *v.* Turk, 1856, 23 Beaven 268; or where the conversion is unnecessary, Chitty *v.* Parker, 1793, 2 Vesey 271. "Previous to the case of Ackroyd *v.* Smithson, it was held that an unqualified direction by a testator in his will to sell land or to buy land with his money created a complete conversion in equity of the land into money or of the money into land, and that this conversion was effective for all the purpose of devolution at the testator's death, so that land thus converted would devolve in equity as if it were money, *i.e.*, would go to the executor in whose hands it would be money for all purposes, for example, for the payment of debts and legacies and for distribution among the testator's next of kin; and so that money thus converted would devolve in equity as if it were land, *i.e.*, would pass as land to the testator's devisees or descent to his heir,—so that it would neither be assets for payment of debts, nor liable for legacies, and the testator's next of kin would have no claim upon it." Langdell Equitable Conversion 19 Harvard Law Review 1, where an interesting account is given of Lord Eldon's connection with this celebrated case.

After an extended examination of the authorities, Professor LANGDELL continues, *Idem* 23:

SMITH *v.* CLAXTON AND OTHERS.

IN CHANCERY, BEFORE SIR JOHN LEACH, V.C., 1820.

[4 *Maddock* 484.]

Thomas Smith, by his will, April 1st, 1811, after making certain specific bequests to his wife, Margaret Smith, bequeathed all his personal estate and his real estate in the town of Stokesley, to Hisilton and Stevenson, upon a trust, to sell the same and from the proceeds to pay first his debts, and funeral expenses, and then to pay as legacies, £40 to his wife; £10 to his son Thomas; £300 to his son Joseph; £1,000 to his son Robert; £40 to his niece Mary:—the last three within six months of his death, without interest, if they were living, not otherwise. A further sum

"What, then, are the changes which the authorities show to have taken place in respect to the equitable conversion of land into money by will since Ackroyd *v.* Smithson was decided?

"1. As to what constitutes such equitable conversion there has been no change. 2. Prior to Ackroyd *v.* Smithson evidence of such intention seems to have been looked for only in such directions as the will contained respecting a sale of the land, what mode of dealing with and managing the proceeds of the sale prior to or independent of, any gift of the latter since Ackroyd *v.* Smithson such evidence has been primarily looked for in the gift or gifts which the testator makes of the proceeds of the sale; and as evidence of the intention to have the land sold, a gift which does not take effect is regarded as no gift.

"3. In the absence of evidence to the contrary, it will be presumed that the testator intended to have so much only of the land sold as his effective gifts of the proceeds of the land shall render necessary, and hence so much of the land only will be converted in equity, a rule, which had no existence prior to Ackroyd *v.* Smithson.

"4. Since Ackroyd *v.* Smithson, however, the doctrine has become established that an equitable conversion by will is presumptively coextensive only with the purposes for which the sale is directed, and hence the distinction has become established between an equitable conversion for the purposes of the will only, and an equitable conversion 'out and out'; and as the presumption is that a testator intends the land to be sold only for the purposes which he expresses in his will, so the presumption is that he intends to create an equitable conversion for the purposes of his will only.

"7. For while such a conversion before Ackroyd *v.* Smithson caused any portion of the land, the produce of which was not disposed of, to go to the testator's personal representatives, it now has merely the effect of causing the heir to take the same as money.

"8. The true reason seems to be that the courts now recognize the fact as they did not prior to Ackroyd *v.* Smithson, nor till long afterwards, that an equitable conversion of land by will can never come in time to intercept the descent of the land to testator's heir."

of £40 was to be paid to his nephew-in-law, Thomas Coxton, when latter was twenty-one years of age. The ultimate residue or surplus was to go to his wife, executors, etc. Other property as devised to the same trustees upon a further trust to receive the profits and pay them to his wife during her life; after her death, to his son Thomas, at whose death the closes were to be sold and the proceeds to be divided equally amongst Robert, son of Thomas, and other children, lawfully to be begotten of his son Thomas, the interest to be considered vested in them respectively, when they attained twenty-one; but if his said grandchildren born and to be born should die before they were twenty-one, unmarried and without issue, then the money was to go to his sons Joseph and Robert in equal shares. Other freeholds were given to the same trustees, out of which to pay an annuity of £27 to his son Thomas, during the life of his wife, and subject thereto to pay the rent to Robert for life; after his death to his children; and if no children, then to go to the testator's sons Thomas and Joseph equally.

The testator died 29th February, 1816, and left surviving Thomas Smith, his eldest son and heir at law; and also his two other children, Margaret Smith and Joseph Smith; but the testator's wife, and his son Robert, and also his grandson Robert (the son of the testator's son Thomas), died in the lifetime of the testator. The legacies bequeathed to them having lapsed, the other specific and pecuniary legacies and debts charged upon the testator's freehold estate, in aid of his personal estate, were very small, and were paid out of his personal estate, which was more than sufficient for the payment of the same.

Thomas Smith, the son, died 14th June, 1816, without issue, having previously made his will, but not attested, so as to pass real estates in favor of the plaintiff, his wife, and others; and the wife filed the present bill to obtain a decision as to the effect of the will of Thomas Smith elder, and the questions were:

1. Under the first devise, whether, as the debts and legacies were paid from the personal estate, and the wife was dead, Thomas, the heir of the testator, took the estates, as land which descended to his heir; or as money, which passed to his personal representative?

2. Under the second devise, whether, as the testator's son Robert, had died in his lifetime, the moiety of the produce of the sale, which was given to him, and being lapsed by his death, vested in Thomas, as heir of the testator, was to be considered as land descending to the heir of Thomas; or as part of the personal estate of Thomas?

3. Under the third devise, whether the money of the produce of the sale, which Thomas the heir took by limitation, upon failure of Robert and his children, was also to be considered as land descending to the heir of Thomas; or as part of the personal estate of Thomas?

The Vice-Chancellor. The inaccuracy of some expressions, which are to be found in the books, has created much of the difficulty which arises in cases of this kind. I have anxiously considered every authority

which has been referred to; and my endeavor has been to extract from them certain general principles which may admit of clear application. Where a devisor directs his real estate to be sold, and the produce to be applied to particular purposes, and those purposes partially fail, the heir at law is entitled to that part of the produce which in the event is thus undisposed of. The heir at law is entitled to it, because the real estate was land at the devisor's death; and this part of the produce is an interest in that land not effectually devised, and which therefore descends to the heir. It is for this reason that the produce of an estate, which the devisor directs to be sold, can never be strictly part of his general personal estate. If a devisor directs such produce to be paid to his executors, and applied as part of his personal estate, the executors take it as devisees. Every person, taking an interest in the produce of land directed to be sold, is in truth a devisee and not a legatee. A devisor may give to his devisee either land, or the price of land, at his pleasure; and the devisee must receive it in the quality in which it is given, and cannot intercept the purpose of the devisor. If it be the purpose of the testator to give land to the devisee, the land will descend to his heir; if it be the purpose of the devisor to give the price of land to the devisee, it will, like other money, be part of his personal estate. Under every will, when the question is, whether the devisee or the heir failing, the devisee takes an interest in land, as land or money, the true inquiry is, whether the devisor has expressed a purpose that, in the events which have happened, the land shall be converted into money? Where a devisor directs his land to be sold, and the produce divided between A and B, the obvious purpose of the testator is, that there shall be a sale for the convenience of division; and A and B take their several interests as money, and not land. So, if A dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the devisor, that there shall be a sale for the convenience of division, still applies to the case; and the heir will take the share of A, as A would have taken it—as money, and not land. But in the case put, let it be supposed that A and B both die in the lifetime of the devisor, and the whole interest in the land descends to the heir; the question would then be, whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the devisor being, that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devisees wholly failed, and the heir would therefore take the whole interest as land.

To apply these principles, which I apprehend to be the true result of all the authorities to the present case: Under the first devise, the estate is directed to be sold, and the produce applied in aid of the presonal estate, in payment of debts and legacies; and the surplus is given to the wife. The debts and legacies are fully paid out of the personal estate; and the wife dies in the testator's lifetime. The whole interest

thus resulted in Thomas the heir and the devisor's purpose of sale being plainly for a distribution, according to the will, has no application to the events which have happened, and Thomas took the estate as land, which descends in that character to his heir.

Under the second devise, there is an obvious purpose of sale for the convenience of division between the sons of Thomas, or failing them, between the devisor's sons Joseph and Robert. The only son of Thomas, and the devisor's son Robert, both die in the devisor's lifetime, and Thomas the heir becomes entitled, by lapses, to the moiety of the produce intended for Robert. The purpose of sale for convenience of division still applies to the events which have happened, and this moiety is not land, but personal estate of Thomas the heir.

Under the third devise, there is the same obvious purpose of sale; first, for a division between the children of Robert; and failing, then between Thomas the heir and Joseph. There were no children of Robert, but the purpose of sale remains; and this moiety also is not land, but personal estate of Thomas the heir.

Under both these last devises, Thomas the heir might, by agreement with his brother Joseph, have elected to take his interest as land, but no such point is raised in the pleadings, nor are there any facts before the court to that effect.

CLARKE *v.* FRANKLIN.

IN CHANCERY, BEFORE SIR PAGE WOOD, V. C., 1858.

[4 *Kay & J.* 257.]

Vice-Chancellor Sir W. PAGE WOOD:—

It appears to me that this point is governed by authority.

The case of Griffith *v.* Ricketts, 7 Hare, 299, is quite in accordance with the previous authorities. What the Vice-Chancellor there says, is this: "A deed differs from a will in this material respect. The will speaks from the death, the deed from delivery. If, then, the author of the deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate from the delivery of the deed, and, consequently, at the time of his death. The deed thus altering the actual character of the property, is, so to speak, equivalent to a gift of the expectancy of the heir at law to the personal estate of the author of the deed. The principle is the same in the case of a deed as in the case of a will; but the application is different, by reason that the deed converts the property in the lifetime of the author of the deed, whereas, in the case of a will, the conversion does not take place until the death of the testator," Id. 211, 312. It is not a question of actual physical conversion of the property

from real estate into personal property, but whatever be the time at which that conversion is directed to take place, whether in the grantor's lifetime, or after his death, the grantor, by executing a deed of this description, says, in effect: "From the time I put my hand to this deed, I limit so much of this property to myself as personal property."

That is the actual decision in the case of Hewitt *v.* Wright, 1 Bro. C. C. 86. There real estate was limited to the use of the settlor for life, with remainder to trustees, in trust to sell and pay debts and a sum of £2100, and, after payment of their expenses, to pay and apply the residue as follows: to raise £1500 and pay the interest to Dorothy Wright, the daughter of the settlor, till she married, and to pay the principal to Dorothy within twelve months after her marriage; and there was a power of revocation. The settlor died without having exercised that power. Then Dorothy died without ever having been married, and the trust as to the principal sum of £1500 never having taken effect, the question was, whether that sum was personal estate in the grantor and passed by his will? The Lord Chancellor held that it did. "If," he said, "it goes in the case of a will to the heir, in the case of a deed it must result to the grantor; and though, in the case of the will, it cannot go to the executor as money, not having been converted, but must descend to the heir; yet he should think that it was personal estate of the heir, and, if he were dead, would go to his executor" (that has since been decided to be the case); "and if so, where it resulted to the grantor, it would be personalty in his hands, and would pass as such," Id. 90.

That, therefore, is an express decision, that, notwithstanding the trust for conversion of real estate into personal is not to arise until after the death of the settlor, the property is impressed with the character of personalty immediately upon the execution of the deed, and so much as is undisposed of results to the grantor as personalty.

The doctrine of the converse case of personalty directed by deed or will to be converted into land, is fully discussed by Lord ELDON in Wheldale *v.* Partridge, 8 Ves. 227, where, upon the special terms of the instrument, it was held not to be one which upon its execution clothed the property with real uses; but Lord ELDON said, that, but for those special provisions, and if there had been nothing more in the deed, "the property would, immediately upon the execution of the deed, have been impressed with real qualities and clothed with real uses, and the money would have been land," 8 Ves. 236; clearly recognising the rule, that conversion takes effect from the moment of the execution of the deed; and the rights of the parties, and the character in which the property is taken by them, are to be determined according to that conversion.

The principles of these authorities is therefore clearly settled; and where, as here, real estate is settled by deed upon trust to sell for certain specified purposes, and one of those purposes fails, there, whether the trust for sale is to arise in the lifetime of the settlor or not until after

his decease, the property to that extent results to the settlor as personalty from the moment the deed is executed.

The only exception is, where the whole of the purposes for which conversion is directed fail from the moment of the delivery of the deed. In Ripley *v.* Waterworth, 7 Ves. 435, Lord ELDON admits, that, where conversion is directed for a particular and special purpose, or out and out, but the produce to be applied to a particular purpose, and the purpose fails, the intention fails, and this Court regards the grantor as not having directed the conversion. So here, if at the moment when the grantor put his hand to this deed, the purpose for which conversion was directed had failed—for instance, if he had given all the proceeds instead of a part to charitable purposes, so that the property would have been at home in his lifetime, the Court would have regarded it as if no conversion had been directed, and the property would have resulted to the grantor as real estate. And so in Hewitt *v.* Wright, if the only purpose of conversion had been the gift to Dorothy on her marriage, and she had been already dead at the date of the deed without having been married, there again the Court would have regarded the grantor as not having directed a conversion.

But here that consideration does not arise. Here some of the purposes for which conversion was directed had not failed when the deed was executed.

It appears to me, therefore, that the property in question resulted to the grantor as personalty.[1]

SALT *v.* CHATTAWAY.

IN CHANCERY, BEFORE LORD LANGDALE, M. R., 1841.

[3 *Beavan* 576.]

The Master of the Rolls.

The testator in this cause, having appointed certain persons to be executors, devised and bequeathed to them all his real and personal estates (subject to the payment of his funeral and testamentary expences and debts), on trust to sell and convert the whole into money; and having constituted a mixed and blended fund, consisting partly of personal estate and partly of the produce of real estate, he thereout gave certain legacies,

[1] In Baker *v.* Hall, 1806, 12 Vesey, 497, it was held that where an annuity charge upon an estate devised was voided under a statute, that it sank for the benefit of the specific devisee.

and then disposed of the residue. He gave to John Blaydon a pecuniary legacy of 100l., and an equal sixth part of one-third share of the residue.

John Blaydon having died in his lifetime, the intentions of the testator, as to him, were disappointed. The gifts to him lapsed, and with respect to the share of the residue, I am of opinion that the heir at law and next of kin are entitled to it, in shares proportioned to the respective amounts of the testator's real and personal estate.

The real estate is by the will directed to be converted into money, *i. e.*, into personal estate, for the purposes of the will; the testator thereby determined the quality of the property which the legatees were to take; but he has expressed no intention to convert it for any purposes, other than those mentioned in the will; and to the extent to which those expressed purposes have failed; that is, as to any part of the property in respect of which no intention of the testator is expressed, the law is to determine to whom it belongs; and the two sorts of estate being blended, each contributing, in proportion, to fulfil the purposes which can be accomplished, the share of residue which has lapsed must be deemed to consist of proportionate parts of the two sorts of estate; and that being so, the proportion of the lapsed share of residue which consists of the produce of real estate, having been directed to be converted for a purpose which is disappointed, belongs to the heir.

It is not easy to reconcile all the cases which are to be found in the books on these subjects; and the question whether the lapsed pecuniary legacy passes by the gift of the residue, or ought to be considered as undisposed of, appears to me to be attended with more doubt than the other; but considering, however, that the conversion of the real estate must be deemed to have been made for all the purposes of the will; that, besides the intention to give a legacy of 100l. to John Blaydon, there was also an intention to dispose of the residue after payment of the legacies; that the testator had determined the qualities of the property which his legatees were to take; and that the gift of residue is made in terms to give the residuary legatees of personal estate the benefit of lapsed legacies, —it appears to me that the proper course is to follow the decisions of Durour *v.* Motteux, 1 Ves. sen. 520; 1 Sim. & St. 292, and Green *v.* Jackson, 5 Russ. 35, and 2 Russ. & Myl. 238, and in conformity with those cases I am of opinion that the lapsed legacy of 100l. must be held to have fallen into the residue, and to have passed by the gift of the residue.[1]

[1]As a discussion of what lapsed legacies fall into the residuary estate seems more properly to belong to the law of wills, further cases on this subject are omitted.

CURTEIS *v.* WORMALD.

IN CHANCERY, 1878.

[*Law Reports,* 10 *Ch. Div.* 172.]

JESSEL, M. R.:[1]—The point which I have to consider and to decide is this: A testator directed his trustees—for although the same persons may have been appointed executors they are for this purpose trustees, and trustees only—to lay out his residuary personal estate in the purchase of real estate, freeholds and copyholds, to be settled to certain uses, comprising a long series of limitations. The residue was ascertained, that is, the testator's debts and legacies and funeral and testamentary expenses were all paid, and then the residue was at different times laid out by the trustees, pursuant to the will, in the purchase of freehold and copyhold estates, which were conveyed so as to vest the legal estate in the trustees.

That being so, the limitations took effect to a certain extent, and then, by reason of failure of issue of the tenants for life, the ultimate limitations failed, and there became a trust for somebody. Now, for whom?

According to the doctrine of the Court of Equity, settled, if I may say so, by the well-known case of Ackroyd *v.* Smithson, 1 Bro. C. C. 503,—for it has always been the law of this Court since—this kind of conversion is a conversion for the purposes of the will, and does not affect the rights of the persons who take by law independent of the will. If, therefore, there is a trust to sell real estate for the purposes of the will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the persons entitled to the personal estate, that is, the persons who take under the Statutes of Distribution as next of kin. Their right to the residue of the personal estate is a statutory right independent of the will.

The result is that in the case I put there is a trust for the next of kin. How any one could imagine it was a trust for anybody else it is difficult to understand; and had I not been referred to the judgment of a very eminent Judge on this subject I should have said it was impossible to understand it.

There certainly is authority for saying—a single authority, and an

[1] The statement of facts and arguments of counsel are omitted.

authority standing alone—that the ultimate trust is not for the next of kin, but for the executors. Why? The executors have ceased to have anything whatever to do with the matter. They have paid over the legacy to the legatee, who happens to be a legatee-trustee, and who holds it by law, under the Statutes of Distribution, as trustee for the next of kin, and no one else. By what process of reasoning any other result can be arrived at I have been unable to discover. The decision to which I have referred is one which, to my mind, is utterly opposed to the whole law upon the subject.

Then the next question which arises is, how does the heir-at-law in the first case, or the next of kin in the second, take the undisposed of interest? The answer is, he takes it as he finds it. If the heir-at-law becomes entitled to it in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representative, and consequently his executor takes it as part of his personal estate.

On the other hand, if the next of kin, having become entitled to a freehold estate, dies, there is no equity to change the freehold estate into anything else on his death: it will go to the devisee of real estate, or to his heir-at-law if he has not devised it, and will pass as real estate. As to that, there is no question, no doubt, no difficulty. No one has suggested any other principle, and even in the case cited—Reynolds *v.* Godlee, Joh. 536, 582,—it was admitted that that was the principle, and the only point of difference or distinction suggested was that which appears to me to be opposed to the whole law on this subject, namely, that there was an ultimate trust for the executors, and not for the next of kin.

As that does not seem to me to have any foundation, and as it appears to me to be opposed to both principle and authority, I do not consider myself bound to follow that decision, and I may say that I am very glad to find I can invoke the very same judgment of the very same Judge for the purpose of shewing that I am not bound to follow it; for, being referred to a decision of another Judge—the Master of the Rolls—given several years before, he said that that decision was not obligatory upon him; but that as he thought it consonant with sense and reason, and sound law, he chose to follow it. Unfortunately I do not entertain the same view as regards this authority, and therefore I am unable to follow it.

A declaration was accordingly made "that all the real estate bought or contracted to be bought before the death of the last tenant for life passed to Edward Walker and Benjamin Walker, the next of kin of the said testator, as real estate in equal moieties, and that George Walker became entitled to one of such moieties as the devisee of the said Edward Walker, and to the other moiety as the heir-at-law of the said Benjamin Walker at his (Benjamin Walker's) death, and that both of such moieties passed to the devisees of the real estates under the will of the said George Walker."

The legal personal representative of Benjamin Walker appealed. The appeal was heard on the 20th of December.[1]

JAMES, L. J.:

I have no doubt as to the proper decision to be arrived at in this case. With all deference to the judgment of Lord HATHERLY, it is impossible, I think, to arrive at any other conclusion than that at which the Master of the Rolls has arrived. It was settled by Cogan *v.* Stephens that what was the right rule as between the real and personal estate where land was directed to be sold, was also the right rule as between the two estates in the case where money was directed to be laid out in the purchase of land, that is to say, if the purpose for which the land was required failed, the undisposed of interest went back to the persons entitled to the personal estate. It has been urged that this means that it goes back to the executors to be dealt with as personal estate. But where there is no trust remaining to be performed, and the executors have entirely discharged themselves from every executorial duty, it is absurd to say that the undisposed of interest in the personal estate is to go back to them upon trust for the persons entitled to the personal estate; it goes directly to the persons beneficially entitled, that is to say, to the next of kin, just as the undisposed of proceeds of the sale of real estate go to the heir-at-law. And therefore the same principle applies in both cases, which is this, that where you trace property into a man there is no equity between his different classes of representatives as to altering the position in which that property is. If it is money arising from the sale of the land it remains money, that is to say, the heir-at-law of the person who has become beneficially entitled to it as heir-at-law has no land. If it is land purchased under a direction to invest in land, the persons in the personal estate of the persons who have become entitled to it as next of kin, have no right to have it reconverted into money. This property came to the next of kin in the shape of real estate, and their

[1] "His judgments, which were always remarkably full and lucid, were rarely appealed from and still more rarely reversed. His self-confidence was very great. 'I may be wrong,' he said once while solicitor-general, 'and sometimes am, but I never have any doubts.' This confident habit of mind with his extraordinary love of despatch led to his describing with perhaps undue depreciation Lord ELDON as 'the dubitative chancellor,' who might have sat to a painter for the impersonation of law's delay. Lord HARDWICKE he considered the greatest of English equity judges, Lord CAIRNS he was inclined to place second, and himself third. It is certain the final estimate of his powers will be a very high one."

The learned Master of the Rolls was under no illusions as to the nature of the Roman law and its influence upon English jurisprudence. For example he once impressively and truly said: "Only in a sense was it true that our common law was not based on the Roman law, for we had used the Roman law as the Turks used the remains of the splendid temples of antiquity. We had pulled out the stones and used them in constructing buildings which we called our own." Article on Sir GEORGE JESSEL, in Dict. of Nat'l Biography.

personal representatives have no equity to have it converted, but it must go to the heirs or devisees of the next of kin according as they died intestate or testate. The decision of the Master of the Rolls must be affirmed.[1]

SEELEY *v.* JAGO.

IN CHANCERY, BEFORE LORD CHANCELLOR COWPER, 1717.

[1 *Peere Williams,* 389.]

One devised that 1000l. should be laid out in a purchase of lands in fee, to be settled upon A. B. and C. and their heirs, *equally to be divided;* A. dies leaving an infant heir; and B. and C. together with the infant heir, bring a bill for this 1000l.

LORD CHANCELLOR. The money being directed to be laid out in lands for A. B. and C. equally, (which makes them tenants in common,) and B. and C. electing to have their two thirds in money, let it be paid to them; for it is in vain to lay out this money in land for B. and C. when the next moment they may turn it into money, and equity, like nature, will do nothing in vain.[2]

[1] "Nearly all of the testator's property consisted of land, and as, by the terms of the will, the part of this land so devised was to be sold, and the proceeds reinvested in other land, the bequest, notwithstanding this double conversion, continued to be real estate." Lane *v.* Eaton, 1897, 69 Minn. 141, 143.

"In order to become personal estate for the purposes of adminstration the money must have belonged to the decedent as personalty. Whatever once descended to her heirs cannot be divested from them, except for the purpose of liquidating some superior claim. . . . The conversion of the land into money was only made for a special purpose; and that having been accomplished, the surplus, by a fiction of equity, is reconverted into land.

"The truth of this view can be easily shown by supposing that the mortgaged property had consisted of separate lots, and no more had been sold on the foreclosure than was necessary to satisfy the mortgage. The unsold residue would then, of course, belong to Mrs. Dunning's heirs or devisees. Could it possibly have made any difference, if the lots had happened to be sold and a surplus realized?" Per DWIGHT, J., in Dunning *v.* Ocean National Bank, 1875, 61 N. Y. 497. There has, however, been some fluctuation in doctrine in New York. See Bogert *v.* Furman, 1843, 10 Page 496.

[2] Accord Benson *v.* Benson, 1710, 1 Peere Williams, 130; Short *v.* Wood, 1718, 1 Peere Williams, 470; Howell *v.* Tompkins, 1886, 42 N. J. Eq. 305.

But as to the share of the infant, that must be brought before the Master, and put out for the benefit of the infant, who, by reason of his infancy, is incapable of making an election. Besides, that such election might, were he to die during his infancy, be prejudiced to his heir.[1]

BRADISH *v.* GEE.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1754.

[*Ambler* 229.]

Lord HARDWICKE, Chancellor. Where a decree is made by consent of counsel, there lies no an appeal or rehearing, though the party did not really give his consent; but his remedy is against his counsel, &c., but if such decree was by fraud and covin, the party may be relieved against it, not by rehearing or appeal, but by original bill. Richmond *v.* Tallicur, Floyd *v.* Mansell. So at law, defendant may plead judgment was by fraud and covin against his testator.

In the above cases, the decree itself was pleaded, but the fraud itself was not sufficiently denied; but if fraud is denied in the answer, the decree which is impeached may be pleaded to such a bill.

[1] Pomeroy speaks of those who may make an election as follows:

"A person absolutely entitled and *sui juris*. Benson *v.* Benson, 1 P. Wms. 130; Sisson *v.* Giles, 32 L. J., N. S., Ch., 606; 3 De Gex, J. & S. 614; Prentice *v.* Janssen, 79 N. Y. 478.

"Infants cannot elect, but the court may, for their advantage. See Seeley *v.* Jago, 1 P. Wms. 389; Carr *v.* Ellison, 2 Brown. Ch. 56; Van *v.* Barnett, 19 Ves. 102; Robinson *v.* Robinson, 19 Beav. 494; *In re* Harrop, 3 Drew. 726, 734.

"Lunatics cannot. Ashby *v.* Palmer, 1 Mer. 296; *In re* Wharton, 5 De Gex, M. & G. 33; *In re* Barker, L. R. 17 Ch. Div. 241.

"Married Women.—Under the former law they could only elect by means of a fine, or by a consent in open court. Oldham *v.* Hughes, 2 Atk. 452, 453; Binford *v.* Bawden, 1 Ves. 512; 2 Ves. 38; Frank *v.* Frank, 3 Mylne & Co. 171; May *v.* Roper, 4 Sim. 360; Standering *v.* Hall, L. R. 11 Ch. Div. 652; Wallace *v.* Greenwood, L. R. 16 Ch. Div. 362. Under the statute 3 and 4 Wm. IV., c. 74, sec. 77, a wife may elect by means of a deed in which her husband joins, and which is properly acknowledged by her. Briggs *v.* Chamberlain, 11 Hare 69; Bowyer *v.* Woodman, L. R. 3 Eq. 313; Tuer *v.* Turner, 20 Beav. 560; Forbes *v.* Adams, 9 Sim. 462. A deed by husband and wife, not so acknowledged, or by either alone, would be insufficient. Sisson *v.* Giles, 32 L. J., N. S., Ch. 606; 3 De Gex, J. & S. 614; Franks *v.* Bollans, L. R. 3 Ch. 717. In this country a married woman can doubtless elect by means of any instrument sufficient to enable her to convey real estate." 3 Pomeroy Equity Jurisprudence, § 1176 n. (1).

Where money is directed to be turned into land, or *vice versa,* the person entitled to it may elect in which way he will take it, as money or land; and very slight evidence of his intention by acts done will be sufficient; but his Lordship said, he could not admit that parol declaration would, as was intimated by Lord MACCLESFIELD in Edwards *v.* Earl of Warwicke; and when he has once signified that intention, he is bound by it.

In the present case, one tenant in common had consented to a decree for sale of the whole estate, and his Lordship said, he was bound by it; for the other parties were interested in that consent, because their shares of the estates would not sell so well separate as if the whole was sold together; and his Lordship said, even if he had afterwards petitioned that the land should not be sold, yet the decree would not be varied, and the money arising by the sale would go to his personal representative.[1]

EARLOM *v.* SAUNDERS.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1754.

[*Ambler* 241.]

William Powell, by will of 21st October, 1729, devised his lands in Cheame, or elsewhere in Surrey, to trustees and their heirs, to the use of his wife Elizabeth for life, remainder to his first, etc., sons in tail male, remainder to his daughters in tail, remainder to Widdrington and William Powell in fee, as tenants in common. And directed £400 should be raised by his executrix out of his personal estate with all convenient speed after his decease, and paid by her to his trustees, or one of them, who should lay out the same in a purchase of lands, or any other security or securities as they should think proper and convenient; and directed the lands so to be purchased, and the security or securities on which the £400 should be so laid out, should be made to and settled on the trustees, their heirs and assigns, in trust and to the use of his wife for life, and after

[1] "Where the law has impressed real property and uses upon moneys, it is necessary, in order to put an end to that impression, that it be shown either that the party entitled to the property and having a right to elect in what shape he will take it, has declared that election or done some act denoting his intention thereto; or the property must, according to an expression, used in some of the cases at home—that is, the person being the absolute owner must have in himself the entire qualification of heir and executor. He must not only have the *just in re* but no other person must have an outstanding *jus ad rem.* In that case if he makes no declaration of his intention in relation to it, it shall go according to the quality in which it was left at his death." Per MASON, J., in Foreman *v.* Foreman, 1849, 7 Barb. 215, 220.

to such uses, and under such provisions, conditions, and limitations as his lands before devised were limited.

There was no issue of the testator. After his death, Widdrington died; and after him, the testator's widow died. William Powell also died afterwards, two days under the age of 21 years, having by will given all his estate in general words to plaintiff.

Question. Whether the £400 is to be considered as money, not having been laid out in land by the trustees, who, it was contended, had an election to lay it out in purchase of land or on security, and by not having invested it in land, had determined that election, and therefore it was well devised by the will of William as money?

Lord HARDWICKE, Chancellor, after hearing only one counsel for defendant, gave his opinion, in which he said he had no doubt William Powell, who became entitled to the remainder in fee, had a proper election to consider it as money or land, and had he been at age, might have done some act to determine it either way; but as he died under 21, he could not do such act, nor make his election. This court never admits trustees to have such election to change the rights, unless it is expressly given them. Here the money is to be laid out in land or securities, for such uses as the land is before settled. If it is laid out in securities (which are personal), all the limitations might not take place; for if there was a son born he would take the whole money, as being tenant in tail, and the subsequent limitations would be defeated. The only way to make the clause consistent is, that the money be laid out on securities till lands are purchased, and the interest and dividends, in the meantime, to go to such persons as would be entitled to the land.[1]

[1] "The executors cannot sell by attorney. The power given to them by the will was a personal trust and confidence, to be exercised by them jointly, according to their best judgment, under the circumstances contemplated by the will. One executor in this case cannot commit his judgment and discretion to the other, any more than to a stranger; for *delegatus non potest delegari*. The testator intended that his representatives should have the benefit of the judgment of each of the executors applied to the given case so long as both of them were alive. The agreement to sell was not valid, being made by one executor without the personal assent and act of the other. The power was not capable of transmission or delegation from one executor to the other, and the rule of law and equity on this point is perfectly well settled. 9 Co. 75, Comb's case; Ingram *v.* Ingram, 2 Atk. 88; Sir THOMAS CLARKE in Alexander *v.* Alexander, 2 Ves. 643; Lord HARDWICKE in Attorney-General *v.* Scott, 1 Ves. 417; Lord REDESDALE in 2 Sch. & Lef. 330; Hawkins *v.* Kemp. 3 East 410; Sudgen on Powers, 2d edit., 167." Per Chancellor KENT, in Berger *v.* Duff, 1820, 4 Johns. Ch. 368, 369.

PRENTICE *v.* JANSSEN.

THE COURT OF APPEALS OF NEW YORK, 1880.

[79 *N. Y.* 478.]

MILLER, J. The complainant in this action demands an equitable partition or sale of several pieces of land therein described, upon a portion of which was erected a hotel, called the Pavilion Hotel, together with the personal property, consisting of furniture in said hotel, and that an account be taken of the disbursements and expenditures made by the plaintiff, Augustus Prentice, for the benefit of and as additions to said property, and that the share of the defendant, Mary Ann Janssen, be charged upon the same and deducted from her portion of the proceeds of the sale of the property. The land belonged to Francis Blancard at the time of his decease in 1868, and the title is derived under the provisions of his last will and testament. The plaintiff, Augustus Prentice, holds three-fourths, by conveyances from the residuary legatees or their representatives, and the defendant, Mary Ann Janssen, the remaining one-fourth. The defendant last named has joined with the plaintiff in making leases of the property since 1873; large sums have been expended in making improvements by the owners, and the rents have been received and applied in part, if not entirely for that purpose.

The residuary clause in the will of Francis Blanchard devised and bequeathed his property to five of his children, among whom were Francis H. Blancard and the defendant, Mary Ann Janssen. It also authorized Francis H. Blancard to carry on the hotel business in the Pavilion Hotel, for the term of five years, if he so desired, and the executors were empowered and directed, after the testator's death, to sell and convert into money all the real and personal property of which he should be seized or possessed, including the hotel property, after the right of occupancy of his son had ceased, as they should deem advisable, and divide the proceeds equally among the residuary legatees. The son, Francis H., died before the testator, and no action was ever taken by the executors to sell the property, and it remained undisposed of, and was used and regarded by the owners as real estate to which they had title. Only one of the executors, the defendant, Gerhard Janssen, was living at the time of the commencement of this action, and he is made a party, as the husband of the defendant, Mary Ann Janssen, and does not by his answer claim any rights as executor or that he is a proper party as such. The answers admitted that plaintiff and the defendant, Mrs. Janssen, owned the property as tenants in common. We think that under the provision cited from the testator's will, the executors who were donees of a power took no estate in the lands as trustees, but merely a power in trust to be ex-

ecuted for the purposes of distribution, according to the will, which was liable to be defeated by a reconversion of the property, which was made personal by the will, into real estate.

The testator, by the authority and direction to his executors to sell the real estate, and, being thus converted, the residuary legatees were entitled to take the same as such and had a right at their election to reconvert into real estate. No distinct and positive act is required for such a purpose, and the rule applicable to such a case is that "in the reconversion of real estate, a slight expression of intention will likewise be considered sufficient to demonstrate an election on the part of those absolutely entitled." Leigh & Dalzell on Eq. Conversion, 5th vol. of Law Library, m. p., 168; Mutlow *v.* Bigg, L. R., 1 Chan. Div., 385; 1 Jarman on Wills, 523, *et seq.* The real estate was not disposed of by the executors under the provisions contained in the will, and as there was no obstacle to prevent a reconversion of the same by the parties in interest from personal into real estate. This they elected to do by positive and unequivocal acts. Three of the four residuary interests were conveyed to the plaintiff, Augustus Prentice, and the defendant, Mary Ann Janssen, retained the other one-fourth. The whole has since been enjoyed, possessed and treated the same as real estate. This was done by the acquiescence of the executors and all the parties in interest, not only by possession, but by acts showing their intention beyond any question. In Story's Equity Jurisprudence, § 793, it is said that if land is directed to be converted into money merely, the party entitled to the beneficial interest may, if he elects so to do, prevent any conversion of the property and hold it as it is. This has been done by the residuary legatees here; and as the lands were not sold and disposed of by the executors, and no diversion made, the rule applies that the person entitled to the money, being of lawful age, can elect to take the land, if the rights of others will not be affected by such election. Hetzel *v.* Barber, 69 N. Y., 1, 11. No rights of other parties were injured by the election to reconvert; and as three-fourths of the residuary interests had been sold and conveyed to the plaintiff by those who were entitled to the proceeds of a sale, if one had been made under the power, and the owner of the remaining one-fourth had assented to the reconversion, by exercising acts of ownership, and the purpose of the power had become unattainable, the power to sell became extinguished, and the plaintiff and defendant already named became owners as tenants in common.

DEETH *v.* HALE.

In Chancery in Ireland, before Lord Chancellor Manners, 1809.

[2 *Molloy*, 317.]

Testator had ordered lands to be sold, and the produce divided amongst certain persons of whom plaintiff is one. The other persons entitled wished the property as it was to be divided, but plaintiff filed this bill for a sale.

Lord Chancellor Manners:

The testator desired the land to be sold and the money shared, and though the others oppose it, the court must order it to be done, and the costs of all paid out of the fund.[1]

[1] Accord: Halloway *v.* Radcliffe, 1857, 23 Beaven, 163; Wayne *v.* Fouts, 1901, 108 Tenn. 145; Fletcher *v.* Ashburner, 1779, 1 Bro. C. C. 497; McDonald *v.* O'Hara, 1895, 144 N. Y. 566; Bank of Ukiah *v.* Rice, 1904, 143 Cal. 265; McWilliams *v.* Gough, 1903, 116 Wis. 576; but see Reed *v.* Underhill, 1851, 12 Barb. 113; where it was held that one of the beneficiaries could pass his interest by a conveyance.

"Sale of land by order of the court. Where land is thus sold, and there is any surplus of money after satisfying the purpose for which the sale was made, such surplus is always regarded and treated as real estate. Cooke *v.* Dealey, 22 Beav. 196; Jermy *v.* Preston, 13 Sim. 356; but see Steed *v.* Preece, L. R. 18 Eq. 192, per Sir George Jessel. Infants' estates: In general a court of equity will not direct a conversion of one kind of property belonging to an infant into another kind. *Ex parte* Phillips, 19 Ves. 118, 122. As to the proceeds of timber ordered to be cut on an infant's estate, see Dyer *v.* Dyer, 34 Beav. 504; Field *v.* Brown, 27 Beav. 90. If the infant is owner in fee, the proceeds are realty; if he is a life tenant, they are personalty. Lunatics' estates: The court will not, without sufficient cause, change the nature of a lunatic's property. Oxenden *v.* Lord Compton, 2 Ves. 69, 72; *In re* Badcock, 4 Mylne & C. 440. If lunatics' lands are sold by order of court, the surplus of the money always remains real estate. *In re* Wharton, 5 De Gex, M. & G. 33; *In re* Sloper, cited 22 Beav. 198; *In re* Barker, L. R. 17, Ch. Div. 241; and see Smith *v.* Bayright, 34 N. J. Eq. 424. The same rule prevails in sales ordered for purpose of partition. Foster *v.* Foster, L. R. 1 Ch. Div. 588; Mildmay *v.* Quicke, L. R. 6 Ch. Div. 553; Mordaunt *v.* Benwell, L. R. 19, Ch. Div. 302." 3 Pomeroy's Equity Jurisprudence, § 1167, n. (2).

PART II.

REMEDIES.

CHAPTER I.

INJUNCTIONS.

SECTION 1. WASTE.

JESUS COLLEGE *v.* BLOOME.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1745.

[3 *Atkyns* 262.][1]

[Printed ante page 115.]

WATSON *v.* HUNTER & McCLAY.

IN THE COURT OF CHANCERY OF NEW YORK, 1821.

[5 *Johnson's Chancery* 169.]

The bill stated, that the plaintiff had a deed in fee for the premises mentioned, under a declaration of trust, in favor of Samuel S. Haight, to be executed on payment of 1,668 dollars and 36 cents: to secure which payment, the fee of the land was vested in the plaintiff. That the defendants were in possession, under a lease for four years; that the principal value of the land, as a security, consisted in the pine timber growing thereon. That the defendants were committing great waste in the timber, and had already cut down large quantities of it, and were sawing it, at their mills, for sale. That the premises were a slender security for the debt due to the plaintiff, charged thereon. Prayer for an injunction, restraining the defendants from cutting down any more timber, or from removing that already cut down and not sawed, and that which was converted into boards or plank; and for general relief.

WARD, for the motion.

The Chancellor [KENT.] Injunctions to the extent prayed for may have been granted; but as I am not satisfied as to the propriety of such extensive and summary interference, I have been led to look into the

[1] For the remedy at law and equity in matters of waste, see Jefferson *v.* Bishop of Durham, 1797, 1 Bos. & P. 105, per EYRE, C.J.; Moore *v.* Townshend, 1869, 4 Vroom, N. J., 284, in which Mr. Justice DEPUE discussed the common law of waste with learning and accuracy; Duvall *v.* Waters, 1827, 1 Bland's Chancery, 569, in which the learned Chancellor outlined the jurisdiction and remedies at common law and equity and digested the authorities.

Accord Higginbotham *v.* Hawkins, 1870, L. R. 7 Ch. App. 676.

course of the English authorities and practice on the point. After timber is cut, it ceases to be part of the realty, and is converted into personal property, and trover will lie for it. The question is, whether this Court ought to interfere in the first instance, to control the disposition of that personal property; and that, too, without any special or extraordinary necessity stated for such interference.

The practice of granting injunctions, in cases of waste, is to prevent or stay the future commission of waste; and the remedy for waste already committed, is merely incidental to the jurisdiction in the other case, assumed to prevent multiplicity of suits, and to save the party the necessity of resorting to trover at law. Thus, in the case of Jesus College *v.* Bloom, 3 Atk. 262, Ambl. 54, a bill was filed for an account and satisfaction for waste in cutting down trees, and no injunction was prayed for, and the tenant's estate had been assigned and determined. Lord HARDWICKE held, that the bill was improper, and would not lie merely for satisfaction for timber cut down, and that an action of trover was the remedy. Where the bill was for an injunction to prevent waste, and for waste already committed, the Court, to prevent a double suit, would award an injunction to prevent future waste, and decree an account and satisfaction for what was past. The ground for coming into Chancery, was to stay waste, and not for satisfaction for the damages, as the commission of waste was a tort, and the remedy lay at law. But to prevent multiplicity of suits, the Court, on bills for injunction to stay waste, and where waste had already been committed, would make a complete decree, and give the injured party a satisfaction for what had been done, and not put him to another action at law. The bill, in that case, was consequently dismissed. In the subsequent case of Smith *v.* Cooke, 3 Atk. 381, Lord HARDWICKE observed, that if the estate of the lessee was determined, and he had quit, a party could not come into equity, merely for an account of timber cut wrongfully; but where he continued in possession, and in a condition to commit more waste, the party might come into equity to stay future waste, and also be entitled to an account for the waste committed. So, again, in the case of Lee *v.* Alston, 1 Vesey, jun. 78, the same doctrine was declared by Lord THURLOW. A bill was filed by a remainder man in fee, against a tenant for life, for an account of timber cut, and for an injunction. The answer admitted the cutting of the timber wrongfully, as charged, and an account was decreed. It was observed, that the plaintiff, on the discovery by the answer, might have resorted to trover at law, but he was not obliged to do so, and might have an account under the admission in the answer. The Chancellor referred to the case of Whitfield *v.* Bewit, 2 P. Wms. 240, which was a bill for an injunction to stay waste, and for an account of timber cut, and in which it seemed to be held that the right to the timber cut might be pursued in Chancery, as well as by trover at law.

The same doctrine was declared by Lord HARDWICKE, in Garth *v.*

Cotton, 1 Vesey, 528, and that the decree for an account of the waste already committed was "an incident" to the injunction to stay waste. It would seem, then, to be a stretch of jurisdiction to apply the injunction to this incidental remedy, and to stay the use or disposition of the chattel. This would be enlarging the substituted remedy in this Court much beyond the remedy at law; and if it had been the established English practice, we should not have been without the most clear and explicit cases in proof of it. The recovery in this Court is not the timber itself, in specie, but damages for the value of it; and why should the personal chattel be bound by injunction in this case, more than in any other case, where the remedy is for a tort sounding in damages? This Court will stay the commission of waste, or the transfer of negotiable paper, in certain cases, in order to prevent irreparable mischief; but the only mischief that can arise in the present case, as to the timber already cut and drawn to the mills of the defendants, is the possible inability of the party to respond in damages. That is a danger equally applicable to all other ordinary demands, and it is not an impending and special mischief, which will justify this extraordinary preventive remedy by injunction. If the injunction could be ordinarily applied to waste, already committed, I apprehend we should very rarely hear of a special action on the case, in the nature of waste, in the courts of common law.

In the case of the Bishop of London *v.* Webb, 1 P. Wms. 527, an injunction was called for against a lessee for years, to prevent digging the ground for brick, as it was destroying the field and carrying away the soil. The Lord Chancellor said, "Let the defendant carry off the brick he has dug, but be enjoined from further digging." In Packington's Case, 3 Atk. 213, the bill stated, that the defendant had cut down a great number of trees, and had threatened to cut down and destroy them all, but the injunction only went to restrain him "from cutting down timber trees growing."

The only case I have met with, applicable to the very point, is a very loose note of an anonymous case of 1 Vesey, jun. 93, in which the solicitor-general moved for an order to prevent the removal of timber wrongfully cut down. In what stage of the cause, or upon what state of pleadings and proofs, this motion was made, does not appear. Lord THURLOW is said to have observed, "I have no doubt about the interference of this Court to prevent waste. The only difficulty I have is, as to what shall be done with the timber cut. Trover might be brought for it; but as the Register says many orders of this kind have been made, take the order."

Such a case is not a sufficient authority to extend the injunction to the timber already cut. There must be a very special case made out to authorize me to go so far, and such cases may be supposed. A lease, for instance, may have been fraudulently procured by an insolvent person, for the very purpose of plundering the timber under the shelter of it. Perhaps, in that and like cases, where the mischief would be irreparable, it might be necessary to interfere in this extraordinary way, and prevent

the removal of the timber. I do not mean to be understood to say that the Court will never interfere, but that it ought not to be done in ordinary cases like the present. I shall accordingly confine the injunction to the timber standing or growing at the time of the service of the process.

Order accordingly.[1]

A tenant for life, without impeachment of waste, is clearly not compellable to cut timber in such way as a tenant in fee would think most advantageous, but is entitled to cut down anything that is timber. This motion requires an affidavit pledging deponent, that the trees about to be cut are not fit for timber. It is settled that a tree which a tenant in fee, acting in a husband-like manner, would not cut, may be cut by a tenant for life, unimpeachable of waste, provided that it is fit for the purpose of timber. A tenant for life unimpeachable of waste might cut down all these trees, without question, at law; and to subject him, in this court, to the rules which a tenant in fee might observe, for the purpose of husband-like cultivation, would deprive him of almost all his legal rights. Per Lord ELDON, in Smythe *v.* Smythe (1818) 2 Swanst. 251.

At law a tenant for life without impeachment of waste has the absolute power and dominion over the timber upon the estate, but this court controls him in the exercise of that power, and it does so, as I apprehend, upon this ground, that it will not permit any unconscientious use to be made of a legal power. It regards such an unconscientious use of the legal power as an abuse, and not as a use of it. When, therefore, the court is called upon to interfere in cases of this description, it is bound, I think, in the first place, to consider whether there are any special circumstances to affect the conscience of the tenant for life, for in the absence of special circumstances it cannot be unconscientious in him to avail himself of the power which the testator has vested in him. We have then to consider what are the special circumstances which the Court will regard as affecting the conscience of a tenant for life, and I apprehend that what is particularly to be regarded is the intention of the settlor or devisor. If by his disposition or by his acts he has indicated an intention that there should be a continuous enjoyment in succession of that which he has himself enjoyed, in the state in which he has himself enjoyed it, it must surely be against conscience that a tenant for life, claiming under his disposition, should by the exercise of a legal power, defeat that intention. TURNER, L. J., in Micklethwait *v.* Micklethwait, (1857) 1 De G. & J. 504, 524.[2]

[1] "For past injuries or trespasses, the only remedy is an action at law for compensation in damages. Injunction furnishes no relief. It is resorted to and applied only when an injury to real or personal property is threatened, and to prevent the doing of a legal wrong when an adequate remedy cannot be afforded by an action for damages." Per WAGNER, J., in Owen *v.* Ford, 1872, 49 Mo. 436.

[2] See language of JESSEL, M.R., in Baker *v.* Sebright, 1879, L. R. 13 Ch. Div. 179.

PETETSON *v.* SHELBY.

IN CHANCERY, 1577.

[*Choyce Cases in Chancery* 117.]

The plaintiff hath a lease in reversion granted unto him of certain lands in the defendant's occupation by lease almost expired within a year, and the plaintiff hath Wood and Timber granted to him, and the defendant having no authority to sell the said woods, doth cut down the same and make waste. Therefore a *subpœna* awarded against him to show cause why an injunction should not be granted against him.

KING *v.* BLUNDAVILE.

IN CHANCERY, 1608-09.

[*Tothill* 83.]

The defendant having an estate for life without impeachment of waste, was ordered not to do waste both upon woods and houses.

WILLIAMS *v.* DAY.

IN CHANCERY, BEFORE LORD CHANCELLOR NOTTINGHAM, 1680.

[2 *Chancery Cases.*]

The Lord Chancellor declared, that he would stop pulling down Houses, or Defacing a Seat by Tenant after Possibility of Issue extinct, or by Tenant for Life, who was dispunishable of Waste by express Grant, or by Trust.

LORD BERNARD'S CASE.

IN CHANCERY, BEFORE LORD CHANCELLOR COWPER, 1716.

[*Precedents in Chancery* 454.]

Lord Bernard was tenant for life, without impeachment of waste; and this bill was brought against him by those in remainder, for an injunction to stay his committing of waste; and by the proofs in the cause it appeared, that he had almost totally defaced the mansion house, by pulling down great part, and was going on entirely to ruin it; where-

upon the court not only granted an injunction against him, to stay his committing further waste, but also ordered a commission to issue to fix commissioners, whereof he to have notice, and to appoint three on his part; or, in default thereof, the six commissioners to be named *ex parte,* to take a view, and to make a report, of the waste committed; and that he should be obliged to rebuild, and put it in the same plight and condition it was at the time of his entry thereon: and it was said, that the like injunctions had frequently been granted in this court; and that the clauses of *without impeachment of waste* never were extended to allow the very destruction of the estate itself, but only to excuse from permissive waste; and therefore such a clause would not give leave to sell and cut down the trees which were for the ornament or shelter of a house, much less to destroy or demolish the house; and so it was ruled in my Lord NOTTINGHAM'S time, 2 Chan. Cases, 32.[1]

ROLT *v.* LORD SOMERVILLE.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1737.

[2 *Equity Cases Abridged,* 759.]

The case in effect was thus: A very considerable real estate was limited to Mrs. Rolt (who afterwards married the defendant the Lord Somerville) for life, without impeachment of waste, remainder to the plaintiff Rolt for life, without impeachment of waste, with several remainders over. The defendant the Lord Somerville, to make the most of this estate during the life of his wife, pulled down several houses and out-buildings upon the estate, and sold the same, and also took up lead water pipes that were laid for the conveyance of water to the capital messuage, and dis-

[1] See Bishop of London *v.* Web, 1718, 1 P. Wms. 527; Anonymous, 1729, Mosely, 237; Peirs *v.* Peirs, 1750, 1 Ves. Sr. 522.

In Morris *v.* Morris, 1885, 3 De Gex & Jones, 323, a tenant for life built a new manor house out of the materials from an old house which he had torn down in a suit brought by the remainderman for an account on the ground of waste, Lord Justice TURNER said, at page 328: "I do not rest my decision in this case upon the fact of the estate having been improved by the building of the new mansion house and the pulling down of the old one: for I am not at all satisfied that the question of improvement or no improvement is one by which the court ought to be guided. I apprehend that the principle upon which the court proceeds in these cases is, that the tenant for life of an estate is liable to account in equity for profit derived by him from an improper use of his legal powers in committing equitable waste. If, therefore, the materials of this house had been sold, and the deceased tenant for life had received the proceeds, in my opinion this would have been a case for an account. But all that can

posed thereof, and he also cut down several groves of trees that were planted for the shelter or ornament of the capital messuage. Upon this a bill was brought by the plaintiff to compel the defendant to account for the money raised by the particulars before mentioned, and to put the estate in the same plight and condition that it was before. To this the defendant demurred, and thereby insisted that this waste was committed by tenant for life without impeachment of waste, and therefore he was not liable to be called to an account for what he had done either in law or equity, and if he was, yet the plaintiff could not call him to an account, because he was not a remainderman of the inheritance.

Lord Chancellor HARDWICKE. Though an action of waste will not lie at law for what is done to houses, or plantations for ornament or convenience, by tenant for life without impeachment of waste, yet this court hath set up a superior equity, and will restrain the doing such things on the estate. In Lord Bernard's Case the court restrained him from going on, and ordered the estate to be put in the same condition. In Sir Blundel Charleton's Case the Master of the Rolls decreed that no trees should be cut down that were for the ornament of the park; but Lord Chancellor KING reversed that, and extended it only to trees that were planted in rows. My only doubt is, as to the trees that have been cut down, for if this bill had been brought before such trees had been cut down as were for the ornament or shelter of the estate, this court would have interposed; but here the mischief is done, and it is impossible to restore it to the same conditions as to the plantations, and therefore it can lie in satisfaction only; and I cannot say the plaintiff is entitled to a satisfaction for the timber which is a damage to the inheritance, yet as to the pulling down the houses and buildings, and laying the lead pipes, they may be restored, or put in as good condition again. In the case of my Lord Bernard there were directions for an issue at law to charge his assets with the value of the damages, he not having performed the decree in his lifetime. The demurrer was allowed as to satisfaction on account of the timber, but overruled as to the rest.

be said in the present case, as to any benefit that has been derived by the deceased tenant for life, is this, that he enjoyed the use of the materials of the old house during his life, in a different state from that in which they originally existed on the estate. They remained on the estate, but they remained as materials attached to a new house, and not to the original house to which they were formerly attached; and I do not find any evidence in the case that there has been any sale of the materials, or any other profit derived by the tenant for life, than by the enjoyment of the materials in an altered state. I think that such enjoyment is not the subject of an account of profits, but that the right to such an account arises only where the tenant for life has disposed of the materials and received the profits. I am of opinion, therefore, that this part of the bill was rightly dismissed."

PACKINGTON'S CASE.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1744.

[3 *Atkyns* 215.]

Sir Herbert Packington, tenant for life, without impeachment of waste, of an estate at Westwood, in Worcestershire, being out of the kingdom,[1] his agent was made defendant to a bill brought to stay waste by Mr. Packington, son of Sir Herbert, and first tenant in tail, and has put in an answer.

The motion now was, for an injunction to stay Sir Herbert Packington's agent from cutting down trees in the park at Westwood, which are either an ornament or shelter to the mansion house.

Lord Chancellor. It might be for the interest of private families if the common law had not given so large a power to tenant for life, without impeachment of waste, *vide* Payne *v.* Dor, 1785, 1 Durn. & East, 55, equal to a tenant in fee; but the common law thought it for the interest of the public, as timber might thereby circulate for shipping and other uses.

But this court has restrained their power greatly, in comparison of what it was formerly.

The first case came before Lord COWPER, of Vane *v.* Bernard, 1816, 2 Vern. 738, where the defendant was restrained from pulling down Raby Castle.

The court has gone farther, and has restrained such tenant for life from cutting down timber, either for ornament or shelter of the house; and farther still in the case of Charlton *v.* Charlton, in extending it to the case of a park.

There was, indeed, a difference of opinion between Lord Chancellor KING, and the Master of the Rolls, but only in part, for Lord KING continued the injunction as to trees for ornament, or shelter, but dissolved it as to straggling trees.

It is very proper for the court to preserve trees that are a shelter to the mansion house.

In the present case, only three oaks have been cut down, and if there was no intention to commit further waste, it would be material, but this appears to be but the beginning of waste; for Sir Herbert Packington's

[1] The plaintiff alleged, that the defendant, Sir H. Packington, had cut down a great number of trees, and had threatened to cut down and destroy them all; that Sir H. Packington's agent had agreed for the sale of 2,000 trees, and that in consequence thereof some trees had been actually felled. Note, it does not appear from the allegations of the plaintiff in the present motion, whether the agent had admitted this fact by his answer. Sir H. Packington's answer had not come in. Reg. Lib. B. 1744, fol. 325.

letter has been read in 1741 (the purport of this letter does not appear in the Register's book in the place above cited), whilst he was abroad, in which he says, if his son will not join with him in cutting off the intail, he will give orders for cutting down all the ornamental timber trees.

The question is, whether these are grounds for an injunction to stay waste?

The first objection is, that these trees grow in a wood, and have arisen naturally, and by accident, and not from planting.

But I do not think this will hold, because, whether trees grow natural, or were planted, if they serve as an ornament, or shelter, it amounts to the same thing; and it is very probable the situation of the house was chosen for the sake of cutting ridings and vistas through the woods; and I can mention two of this kind of my own acquaintance, Hampstead, a seat of Lord Craven's, and another in Essex.

I will restrain the defendant, therefore, from cutting down trees in lines, or avenues, or ridings in the park; and likewise from cutting down trees that are not of a proper growth to be cut.

Upon a suggestion that this might create disputes, as to what were of proper growth, and that very little young timber grows in this park, his Lordship left out the last part of the order, and as to the other granted the injunction.[1]

LANSDOWNE *v.* LANSDOWNE.

IN CHANCERY, BEFORE SIR THOMAS PLUMER, V. C., 1815.

[1 *Maddock,* 116.]

The Vice-Chancellor.[2] Upon this demurrer, two points are to be considered: 1st. How the case stood as to the deceased Marquis? 2dly. How the case stands as to his representatives? The late Marquis was tenant for life, without impeachment of waste, and as such had a right at law to cut timber on the estate, and had a property in the trees, but having abused that power by cutting ornamental trees, and trees not ripe for cutting, a court of equity says, he shall not do these things with impunity, but interposes to restrain the legal right; and equity not only restrains him from doing further waste, but directs an account of the waste done, and will not suffer the individual to pocket the produce of the wrong, but directs the money produced by such waste to be laid up for the benefit of those who succeed to the estate.

[1] In Coffin *v.* Coffin, 1821, Jacob, 70, Lord ELDON said: The court does not protect timber because it is ornamental, but it protects it, if it was planted for ornament, whether it is or is not ornamental.

[2] Only the opinion is given.

A bill was filed against the late Marquis, by Wilmot and Baring, the trustees to preserve contingent remainders, and not by a person having the next estate of inheritance; no such person appearing; but there were contingent remainders, and the present Marquis, the next tenant for life, was entitled to the timber cut, or the substitute for it. The late Marquis did not demurr to that bill. Many of the objections taken to this supplemental bill would have applied to the bill filed against the late Marquis. They obtained an injunction, and thereby their competency to sustain the suit was sanctioned; and Garth and Cotton, 1753, 1 Dick, 182, certainly was a conclusive authority in support of that suit. The injunction would not have been granted if the trustees had no right to file such a bill. What is said in Jesus Coll. and Bloom, as to not entertaining a bill after the estate of the tenant for life is determined, applies only to cases where legal waste has been committed, and where the party is liable at law in respect of the waste committed; but here it was equitable waste, as to which a court of law gives no remedy. Lord HARDWICKE, in that case, says, "the party ought to be sent to law"; which shows he was alluding to legal waste. The party had for such waste a remedy under the statute of Marlbridge, 52 Henry 3, c. 23, or might have brought an action of trover; but the court never sends a party to law in cases of equitable waste; they being exclusively of equitable cognizance. As against the late Marquis, therefore, a bill might have been filed, though no injunction were prayed. This court will not permit a man to commit equitable waste, and retain the produce of the injury, which is recoverable in no other court. Relief is given for the benefit of those who come after. The case, therefore, of Jesus College and Bloom is distinguishable from the present. In Garth and Cotton, Lord HARDWICKE, alluding to his decision in that case, says, "It affords no conclusive argument that a bill for an account of waste cannot be maintained without praying an injunction." Dick, p. 211. The Marquis died, after having sold, and converted to his use the money produced by his wrongful act; and upon general principles, independent of decision, the assets ought to be liable to pay in respect of his conduct, such assets having been augmented by it.

It has been urged, that if the Marquis had committed legal waste, and died, his representatives would not have been answerable, it being a maxim, *Actio personalis moritur cum personâ,* and that the same doctrine applies, by analogy, to cases of equitable waste. Let us see in what manner this maxim has been interpreted even at law. In Hambly *v.* Trott, 1776, Cowp. 376, Lord MANSFIELD says, "When the cause of action is money due, or a contract to be performed, gain or acquisition of the testator by the work and labor, or property, of another, or a promise of the testator, express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or arises *ex delicto,* supposed to be by force, and against the King's peace, there the action dies, as battery, false imprisonment, tres-

pass, words, nuisance, obstructing lights, diverting a water-course, escape against the sheriff, and many other cases of the like kind. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating, or imprisoning a man, etc., there, the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees; but for the benefit arising to his testator for the value or sale of the trees, he shall. So far as the tort itself goes, an executor shall not be liable; and therefore it is, that all public and private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executors therefore shall be charged."

This I take to be a just exposition of the qualifications under which the maxim, *Actio personalis moritur cum personâ,* is received at law; and if equity is to decide in analogy to a court of law, the question in the present case will be, Whether, by the equitable waste committed by the late Marquis, he derived any benefit; or, whether it was a naked injury, by which his estate was not benefited? It is clear it was benefited; and as at law if legal waste be committed, and the party dies, an action for money had and received lies against his representative, so upon the same principle, in cases of equitable waste, the party must, through his representations, refund in respect of the wrong he has done. "It would," says Lord COWPER, in Bishop of Winchester *v.* Knight, 1 P. Wms. 407, "be a reproach to equity to say, where a man has taken my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy." It has been argued, that as when legal waste is committed, and there are no persons in being, or appearing, who could authorize it, or bring an action in respect of the waste, the wrong is without remedy; so here, there being no persons *in esse,* or appearing, when the waste was committed, who could authorize it, a bill will not lie in respect of such waste; but it signifies not, whether such person were *in esse* or not, for waste of this description could not be authorized; such destruction cannot be authorized; the court says it shall not be done. The produce of the waste is laid up for the benefit of the contingent remaindermen. To adopt such an analogy to the law, in a case where relief is given against the law, would be singular.

Upon these grounds I think the supplemental bill for an account by the new trustees, the tenant for life, and tenant of the inheritance, was properly brought. The trustees were the proper persons to file the bill against the late Marquis, and the present plaintiffs were the proper persons to file the supplemental bill, though one of the plaintiffs was not *in esse* when the first bill was filed, inasmuch as the money

produced by the waste is not to be pocketed, but to be laid up for the benefit of those who in succession will take the estate.

I think the demurrer objectionable on other grounds; but I decide this case upon the broad principle, that where equitable waste has been committed, which never could have been authorized, the court has jurisdiction to make the representatives of the party committing such waste accountable.

Demurrer overruled.

MARQUIS OF ORMONDE *v.* KYNERSLEY AND OTHERS.

IN CHANCERY, BEFORE SIR JOHN LEACH, V. C., 1820.

[5 *Maddock* 369.]

This bill was filed by the remainderman against the executor of the deceased tenant for life, whose estate had been unimpeachable of waste, for an account of the produce of ornamental timber, which had been cut by the tenant for life.

The plaintiff early in 1808 had filed his bill against the tenant for life himself for the same purposes, and had obtained an injunction. The tenant for life put in his answer to that bill on the 1st of June, 1808, and by consent an order was made on the 31st of July, 1808, referring it to the master to inquire as to the ornamental and other timber which had been cut by the tenant for life.

This order was never acted upon; and the tenant for life lived till April, 1815, without any further proceeding being had in the cause.

The present bill was not supplemental to that suit, but to a subsequent original bill. The case was much argued. I was not present at the argument, but am informed that it was, first, contended that such a bill could not be filed; and the following cases were cited, viz.: Bishop of Winchester *v.* Knight, 1 P. Wms. 406; Garth *v.* Cotton, 1 Dick. 183, s. c. 3 Atk. 751, and 1 Ves. 524, 546; Hambly *v.* Trott, Cowp. 376; Lee *v.* Alston, 1 Bro. C. C. 194; Marquis of Lansdowne *v.* Marchioness Dowager of Lansdowne, 1 Maddock, 116. And secondly, that as no timber had been cut since the injunction in 1808, and the plaintiff had not proceeded in the former cause, he must be taken to have waived his claim in that respect.

The Vice-Chancellor held, that though there was much ground for the latter defense, yet, as it was not made by the answer, he could not notice it. Upon the general point, whether such a bill could be maintained, His Honor stated: That the restraint upon the legal owner as to equitable waste was to be considered as founded on a breach of that trust and confidence which the devisor reposed in the tenant for life, that

he would use his legal estate only for the purpose of fair enjoyment. That it was a trust implied in equity from the subsequent limitations, and from the presumed intention of the testator that he meant an equal benefit to all in succession. That in all cases, the assets of a testator were answerable for a profit made by breach of trust: and an account was decreed according to the prayer of the bill.

WOMBELL *v.* BELASYSE.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1825.

[6 *Vesey* (*Sumner's edition*) 110 *a, note.*]

THE LORD CHANCELLOR. The doctrine of the court is extremely well settled. If the object in planting timber, or in leaving timber standing, is ornament, whether that object is effected, whether the effect is truly ornamental, or the most absurd exhibition that ever was produced, this court will protect that timber; and the protection is not confined to trees planted, or left standing, as ornamental to a house or park: nor does it depend on the distance from the mansion, but I do not recollect that it has gone to this extent, that, if a ride is made through a wood, in which wood the proprietor has been in the habit of cutting timber for the use and repair of the mansion, that ride shall protect the whole wood from being cut at the time of making the ride, and in all future times: as, if the purposes of that ride can be as well consulted by leaving a tenth part of the wood standing, it would be most absurd to require that the whole should be left. Neither do I recollect any issue ever directed upon this; and in directing an issue attention must be had to the interests of all parties; that, if the injunction restrains the legal right to cut timber, security shall be given, that in case of the death of him, whose enjoyment of that legal right may have been restrained improperly, his estate shall, to the extent of the benefit he would have derived from the exercise of that right, be reimbursed by those who restrained him. I think, also, that two issues would be necessary; not only whether the timber was planted, or left standing, for ornament, but also, how far, consistently with that object, trees might be cut; as I cannot hold that the effect of making a ride through a wood is to be, that an axe shall not be laid to the root of a tree in that wood; which would be carrying this doctrine to an extent to which it has never yet gone.

In framing the issue another thing also must be attended to; by whom the trees were planted or left standing for ornament: as, if they had been planted by tenant for life without impeachment of waste, unless afterwards left standing with that view by some person having the inheritance, they would not be entitled to this protection.

WAKERYNG *v.* BAILLIE.

IN CHANCERY, 1461-67.

[1 *Calendars in Chancery* LXII.]

To compel the defendant Baillie to make an estate to the said hospital and to stay waste, the complainant besought "the right worshipfull and revent Fadir in God the bishop of Excestre Chanceller of England," upon the following facts:

It appeared that John Wakeryng was master of the hospital of St. Bartholomew in West Southfield; that the defendant Baillie was feoffee in trust of an estate "called Dokettys" . . . amortized to the said hospital "to thintent to fynde a prest p'petually to syng and office in a chapell then all of newe made"; that the said Baillie "knowyng well the said place called Dokettys, w'out the seasonable wode growyng uppon the same is not of the yerly value to fynde a prest honestly to syng and office in the said chapell and to kepe thobsvancez above specified, hath sold and doo feld great part of the saide wode and in hasty syme poposeth to doo felle the most part of all the same wode to the value of xl. ti. and tanspose the said place with thappurtenancez agayn thintent, desires, and devout willes of the said Richard and Robert above specified, and agayn all right, reason, and conscience. Please it your good and gacious lordship to considere the pymsses, and to grant a writ subpena direct to the said Nicholas to appere by fore your said lordship at a ctain day by you to be lymytted, there to be ruled to relese his right in the said place with thappurtenancez to his said ofeffees to thenlent that he may have noe power to do noe more wast upon the said place, and to make sufficient and due satisfaccion for the said wode so sold and feld, as all good consciens requireth, and that the said cofeffees may accomplyssh and fulfille the devout willes and desires aforesaid, for the love of God and in wey of charita."

ANONYMOUS.

IN CHANCERY.

[*Cary* 27.]

A lease is made for life, the remainder for life, the remainder over in fee; the first lessee maketh waste; and because he in the fee hath no remedy by the common law, and waste is a wrong prohibited, he shall be holpen in *Chancery, Crompton* 48, 6.

HALE *v.* HALE.

IN CHANCERY BEFORE LORD KEEPER SOMERS, 1692.

[*Precedent in Chancery* 51.]

A. conveys a term for years to J. S. upon trust, to raise £1500 for such child or children of A. as should be living at the time of his death; A. dies, leaving no child, his wife *ensient* with a daughter, which was afterwards born.

My Lord Keeper declared that this posthumous daughter is a child living, at the death of A. within the meaning of the trust, and that a direction of a trust is not to be so strictly construed, as a limitation of an estate at law.[1] And one Lutterel's case was cited in my Lord BRIDGEMAN'S time, where a bill was exhibited on behalf of an infant in *ventre sa mere* to stay waste, and an injunction granted upon it.[2]

SKELTON *v.* SKELTON.

IN CHANCERY, BEFORE LORD CHANCELLOR NOTTINGHAM, 1677.

[2 *Swanston* 170.]

The bill was exhibited against a jointress to stay *maresme* in felling timber, and notwithstanding the defendant's answer, who claimed the inheritance by a deed which the plaintiff controverted, an injunction was obtained until hearing; and now, at the hearing, she proved herself to be jointress in tail; and it was urged by Mr. Attorney, that the defendant being a jointress, within the statute of 11 H. 7, which restrains all power of alienation by fine or discontinuance, she ought likewise to be restrained in equity from committing waste, which is also in disherison of the heir. But this I would by no means allow, that equity should enlarge the restraints or the disabilities introduced by act of Parliament; and as to the granting of injunctions to stay waste,

[1] "There have been several cases put which have never been determined, as that of a child *in ventre sa mere*, but always said *arguendo*, and I should make no scruple in such a case to grant an injunction." Per Lord HARDWICKE, in Robinson *v.* Litton, 1744, 3 Atk. 209, 211.

"But the books go further, and say a bill may be brought for an injunction to stay waste on behalf of an infant *en ventre sa mere*. And so is Musgrave *v.* Parry, 2 Vern. 710, which is liable to much more difficulty, for that must be as *amicus curiae* on the unborn child's behalf." Per Lord HARDWICKE, in Garth *v.* Cotton, 1753, 1 Dick. 183, 198.

I took a distinction where the tenant hath only *impunitatem,* and where he hath *jus in arboribus.* If the tenant have only a bare indemnity, or exemption from an action if he commited waste, there it is fit he should be restrained by injunction from committing it; but if he have a right in the thing itself, when it was wasted and cut down, there it is no way reasonable that he should be restrained: as, for example, if there be tenant for life, the remainder for life, the reversion in fee; here the tenant for life has no right nor power to fell timber or commit waste; yet if he do so he cannot be punished for it in an action of waste, during the life of him in the remainder for life; for that intervening remainder is an impediment to the action; so it is most just to grant an injunction to stay waste; and so it was ruled in the Chancery by advice of judges, P. 41 El. Sir F. MOOR, 554, pl. 748;[1] and EGERTON, C., said he had seen a precedent of such an injunction, 5 R. 2, and so it had been done before, temp. E. 6, Vandemot *v.* Eyr and with this agrees 16 Jac. B. R., 1 Roll. 377, pl. 13, *per curiam.* And the reason of this is most convincing; for when such a tenant for life hath cut down the trees, he in the remainder in fee may take them away, notwithstanding the mean remainder for life, or he may have a trover and conversion against the tenant for life, if he remove them; which shows that such tenant for life hath no property in the trees; it were, *ergo,* most absurd to put the reversioner to recover damages for his inheritance in the trees, or to seize them as chattels, when they may better be preserved to him in specie, by granting an injunction to stay the felling of them. And upon the like reason it may seem that tenant after possibility may be restrained by injunction from committing waste, for so if he fell trees the reversioner may have a trover and conversion, as was held 24 Car. 1; B. R. Udal *v.* Udal's case, p. Rolle *et curiam* and yet *temp. E. R. placita parliament.* Ryley, Appendix, 653. Kirbrok petitions *"quod breve de waste poet giser versus Roger son frere"* (against Maud, the widow of Roger) "tenant in tail, *apres possibilité; Response, ley nest mye uncore ordein en ce cas."* Probably this was before 21 Ed. 3, for in 21 Ed. 3, Rot. Parl. n. 46, the commons petition for a general

[1] "Per Egerton, Keeper of the Great Seal, that he had seen a precedent in the time of Richard II., that where there is a tenant for life, remainder for life, remainder over in fee, and therefore waste in the first tenant for life is dispunishable by the common law; yet it had been deemed in chancery by the advice of the judges, upon complaint of him in remainder in fee, that the first tenant shall not commit waste, and an injunction granted."

In Cotton *v.* Garth, 1753, 1 Dick, 183, 208, Lord HARDWICKE said: "Therefore the case already put, of an intermediate remainder for life, though the law allows no action of waste, this Court sustains a bill for an injunction, and this *abantiquo,* according to the case in Moore, 554, where Lord ELLSMERE says, he has seen a precedent for it, so long ago as in the reign of Richard II. 1st Roll's Abridg. 377, 1 Vern. 23, and many cases in practice."

law, that tenant after possibility might be liable to an action of waste, as being in effect but tenant for life, yet could not obtain it; but this serves only to keep the tenant after possibility in a state of impunity, if he commit waste, not to give him a right to commit it. On the other side, if there be tenant for life, with an express charge to hold without impeachment of waste, he is not to be restrained by injunction, for he hath more than a bare impunity, viz., a right in the trees to fell them; *à fortiori,* in the case in question, no restraint can be put upon a jointress in tail who hath the inheritance; and yet all this notwithstanding, he that hath a lawful power and liberty to commit waste may be restrained by Chancery from using this power, when the waste which he is about to do is signally *contra bonum publicum* (V. 19 Car. 1, B. R. 1 Roll. 380, T. 3), though a lease for years was made without impeachment of waste by the Bishop of Winchester, yet when the lessee for years, towards the end of his term, was about to cut up all the trees, an injunction was awarded by the advice of all the Judges, *pro bono publico,* and in favor of the church, whereof the King is patron, notwithstanding the agreement of the parties. But in my Lord of Orford's case, where the Earl was tenant for life without impeachment of waste, the reversion in fee to the co-heirs of the Lady Banning, and the Earl was about to pull down a house near Colchester, no injunction could be obtained, but the co-heirs and Sergeant Peck, who was a purchaser from one of them, were fain to compound with the Earl. So it seems there is some discretionary latitude in these cases; but that which is more remarkable is, that he who hath a power to commit waste may sometimes be restrained from the exercise of that power, when it tends only to a private damage; as for example, the Lady Evelyn was tenant for life in jointure, remainder to Sir John Evelyn, her eldest son, for life, without impeachment of waste, with several remainders over; the jointress let the land to a tenant at will; Sir John Evelyn enters by consent of the undertenant, and cuts down trees; resolved, though no injunction had lain against Sir John Evelyn if his remainder had fallen into possession, yet now it does; for although the license of tenant at will to enter excuse the entry from being a trespass, yet no possession by such entry can enable him to cut down the trees presently, for the jointress hath right during her life to the shade and the mast; and to reasonable bootes; *ideoque* Lord Bridgman, Custos, awarded an injunction during the life of the jointress. 1 Dec. 1670, 22 Car. 2. Lord NOTTINGHAM'S MSS.: "This court sees no color of cause to give the said plaintiff any relief in this court, and doth therefore think fit and order that the matter of the said plaintiff's bill be from henceforth clearly and absolutely dismissed out of this court; and it is hereby referred to Sir J. F., etc., to tax the said defendants their moderate costs of this suit." Reg. Lib. B., 1677, fol. 33.

ABRAHALL *v.* BUDD.

IN CHANCERY, BEFORE LORD CHANCELLOR NOTTINGHAM, 1680.

[2 *General Abridgment of Cases in Equity*, 757.[1]]

A. upon his marriage settled lands to the use of himself and M. his wife and the heirs of their two bodies. Afterwards A. died *sans* issue. M. married D. (the defendant) being then tenant in tail after possibility of issue extinct, and M. and D. having felled some trees in a grove that grew near, and was an ornament to the mansion house, and having an intention to sell the rest, the plaintiff, to whom the land did belong in remainder, brought his bill to restrain M. from selling those trees, and to have an injunction to stay the committing of waste. The cause was referred, and if the parties could not agree then to be set down again. But Lord Chancellor NOTTINGHAM discovered this inclination *fortiter* for granting an injunction.[2]

[1]This case is also reported in 2 Shower; 2 Freeman's C. C. 53 (incorrectly); 2 Swanston, 172 (correctly from Lord NOTTINGHAM'S MSS.).

[2] "But this Court hath gone still further in the case of Abrahall *v.* Budd, 2 Freeman 53, and Lord NOTTINGHAM cites the case of a Lady Evelyn, where there was a tenant for life, remainder to the first son for life, without impeachment of waste, with remainders over, and the first son by leave of the lessee of the tenant for life, came upon the land and felled timber, which was not under the description of trees growing for shelter, or ornament; and this Court granted an injunction against this, though no action whatsoever could be maintained at law.

"And upon the same ground, I did the like in the case of Flemming against the late Bishop of Carlisle, and others: there the Bishop was tenant for life, remainder to his eldest son for life, without impeachment of waste, with remainder over in fee; the eldest son by permission of the Bishop entered, and began to cut down the timber, and the reversioner in fee, brought a bill for an injunction, and I granted it, because he was not to be allowed to exercise his power of doing waste by anticipation; and before the estate to which this privilege was annexed, came into possession; and this in reason comes near to the case of the late Sir John Hind Cotton's bringing himself by collusion, into possession of the timber, before his time.

"The case of Robinson against Lytton, 3 Atk. 209, 2 Eq. Cas. Abr. 528, went still further than the common law. That cause was heard in this Court, the 12th of Dec. 1744. There was a devise to the defendant and his heirs, and if he should die before his age of 21 years, leaving no issue, then to the testator's first, etc., daughters in tail; remainder to the testator's own right heirs; but if the defendant should live to attain the age of twenty-one years, then the estate should be sold, and the money applied for the benefit of the testator's daughters. The defendant, being under the age of twenty-one years, began to commit waste, and the daughters brought their bill in this case; and though the defendant had the inheritance in him in point of law at the time, yet by reason

ANONYMOUS.

IN CHANCERY, BEFORE SIR JOHN TREVOR, M. R., 1704.

[2 *Freeman* 278.]

A woman tenant in tail, after possibility of issue extinct, was restrained from committing waste in pulling down houses, or in cutting down trees, which stood in defence of the house, and fruit trees in the garden; but for some turrets of trees, which stood a land's length or two from the court, would grant no injunction, because she had by law power to commit waste; and yet notwithstanding, she was restrained in the particulars aforesaid, because that seems to be malicious.[1]

FARRANT *v.* LOVEL.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1750.

[13 *Atkyns* 723.]

A bill was brought by a ground landlord to stay waste in an underlessee, who held by lease from the original lessee.

Lord Chancellor. A certificate being produced of the waste, I am of opinion the plaintiff has the same equity as in other cases of injunctions.

As where there is tenant for life, remainder for life, remainder in fee, yet the court, on a bill brought by remainderman in fee, to stay waste in the first tenant for life, will, notwithstanding the intermediate estate for life, upon a certificate of the waste grant an injunction.

So, where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage, the court, on a bill brought by the mortgagor to stay waste, and a certificate thereof, will grant an injunction.[2]

of the contingent executory limitation, the Court granted an injunction, and at the hearing of the cause after it's being fully argued, made that injunction perpetual." Per Lord HARDWICKE, in Garth *v.* Cotton, 1753, 1 Dick. 183, 209-210.

[1] In Garth *v.* Cotton, 1753, 1 Dick. 183, 209, Lord HARDWICKE said: "There is the like case before Sir JOHN TREVOR, M.R., and this has been followed since by several cases of tenant for life without impeachment of waste generally, who have attempted to pull down a mansion house or to cut down timber growing for shelter, or ornament of the mansion house."

[2] Youle *v.* Richards, 1832, 1 N. J. Eq. 534; S. C. 23 Am. Dec. 722; Givens *v.* McCalmont, 1835, 4 Watts (Pa.) 460.

So, likewise, where there is only a mortgage for a term of years, and the mortgagor commits waste, the court, on a bill by the mortgagee to stay waste, will grant an injunction, for they will not suffer a mortgagor to prejudice the incumbrance.

For these reasons his Lordship granted an injunction to stay waste.

BRADY *v.* WALDRON AND WALDRON.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1816.

[2 *Johnson's Chancery* 148.]

The bill was filed by the plaintiff, a mortgagee, for an injunction to stay waste in cutting timber on the mortgaged premises, whereby the land would become an insufficient security for the debt. There was no suit pending for a foreclosure.

The Chancellor.[1] An injunction lies against a mortgagor in possession to stay waste. The Court will not suffer him to prejudice the security. Dick. Rep. 75; 3 Atk. 210, 237; 3 Vesey, 105.

Injunction granted.

KANE *v.* VANDERBURGH AND OTHERS.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1814.

[1 *Johnson's Chancery* 11.]

The bill, which was for an injunction to stay waste, stated, that Abraham Tenbroeck, being seised in fee of the premises, devised them in fee to his daughter, Margaret, who devised them to her sister, Elizabeth Schuyler, for life, remainder to her children living at her death, and in default of such children, remainder to the children of her brother, Dirck Tenbroeck, in fee. After the death of the two testators, Elizabeth Schuyler, and her husband, released her interest to the plaintiff. Elizabeth is still living, but without issue; and the defendants are tenants

[1] See Bishop of London *v.* Web, 1718, 1 P. Wms. 527; Anonymous, 1729, Mosely, 237; Peirs *v.* Peirs, 1750, 1 Ves. Sr. 522.

An injunction to stay waste will be granted, though there is no suit pending, and though no action can be maintained against the tenant at law.

from year to year. The bill further stated, that actions of ejectment were intended to be brought against the defendants, who had been served with notices to quit, which would expire on the 1st May next; and it charged also, "that the defendants, by themselves, and others hired by them, are daily committing great waste on the premises by cutting down large quantities of valuable wood and timber, for sale, and carrying the same to market, to the great and irreparable injury of the land, and of the estate of the plaintiff."

No answer has yet been put in the bill.

The Chancellor. The waste is explicitly and sufficiently charged in the bill to support the injunction. Nor is it essential to this remedy that there should be an actual *lis pendens* in a court of law. There are numerous cases in chancery, as Lord HARDWICKE has frequently observed, Perrot *v.* Perrot, 3 Atk. 94; Robinson *v.* Litton, 3 Atk. 210; Farrant *v.* Lovell, 3 Atk. 723; Garth *v.* Cotton, 1 Ves, 556, in which the court has interposed to stay waste, by the tenant, where no action can be maintained against him at law. Thus, where there is lessee for life, remainder for life, remainder in fee; the mesne remainderman cannot bring waste, nor the remaindermen in fee, but chancery will interpose and stay the waste.

So equity will, in many cases, restrain waste, though the lease contain the clause without impeachment of waste, and which takes away the remedy at law, as where this power is exercised in an unreasonable manner, and against conscience. Aston *v.* Aston, 1 Ves. 264; Strathmore *v.* Bowes, 2 Bro. 88.

Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court.

The tenant for life is here suffering injury to his own interest, and he, by his tenants, is doing great injury to the inheritance, which it is his duty to prevent. He is bound to stop the mischief, or be responsible himself. To suppose that an ejectment must be actually commenced before the injunction can issue, is certainly an error; this would be placing the operation of waste beyond the reach of control during the period of the six months' notice. Indeed, the notice to quit may be considered as the commencement of an adverse proceeding at law, and sufficient to bring the case within the spirit of the decision in Lathrop *v.* Marsh, 5 Ves. 259.

Motion denied, with costs.

HAWLEY *v.* CLOWES.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT.

[2 *Johnson's Chancery* 122.]

The bill prayed for a partition of land, and for an injunction to stay waste in cutting down and carrying away the timber. It stated, that the plaintiff and defendant owned the land as tenants in common, in equal undivided moieties, and that the defendant is in the actual possession of the whole by himself, or his tenant, and is cutting down the timber, and threatening to persevere; but admitted the plaintiff's title as tenant in common.

An injunction was granted on filing the bill, which was sworn to.

The defendant, in proper person, moved to dissolve the injunction, on the ground that an injunction to stay waste between tenants in common will not lie, and cited Goodwyn *v.* Spray, Dickens, 667, in 1786, and Smallman *v.* Onions, 3 Bro. 621. But if the motion could not be granted *in toto,* he then moved that he might have liberty to carry off the wood already cut before the service of the process.

No answer was put in.

The Chancellor. The injunction must be modified, so as to confine it to timber then standing and growing on the premises, and not wanted for the necessary use of the farm. The last-cited case admitted the authority of the Court to grant the writ between tenants in common, in special cases, as where the defendant was sworn to be insolvent; and Lord ELDON, in the subsequent cases of Hole *v.* Thomas, 7 Vesey, 589, and of Tworl *v.* Tworl, 16 Vesey, 128, admitted the propriety and necessity of this power in the Court, between tenants in common, where the waste was destructive to the estate, and not within the usual and legitimate exercise of enjoyment. The case, therefore, of the exercise of this power, must rest in sound discretion; it is not a case of a want of jurisdiction. Here is a bill for partition, and pending the suit it appears to be extremely fit that the tenant in common in possession should not be permitted to strip the land of its timber. It is destructive, in many cases, of the value of the estate, and not consistent with a prudent enjoyment by the real owner. The statute of W. 2. 13 Edw. I. c. 22, sess. 10 ch. 6, gives an action of waste by one tenant in common against another. It is, therefore, an injury recognized by law, and the remedy by injunction is applicable to every species of waste, it being to prevent a known and certain injury; this remedy is peculiarly proper and appropriate pending a bill for partition of the very land. It comes within the equity of the statute of sess. 10 ch. 50. s. 29, which prohibits a defendant, pending a suit for the land, from making waste, and directs

the Court, where the suit is pending, to prevent it. The injunction, therefore, under the above modification, must be continued until answer, and further order.[1]

Injunction continued.

MOLLINEUX *v.* POWELL.

IN CHANCERY, BEFORE LORD CHANCELLOR KING, 1730.

[3 *Peere Williams* 268, *note F.*]

A., tenant for years, remainder to B. for life, remainder to C. in fee; A. is doing waste; B., though he cannot bring waste, as not having the inheritance, yet he is entitled to an injunction. See Roll. Abr. Roswell's case, 377. But if the waste be of a trivial nature, and *a fortiori,* if it be meliorating waste, as by building on the premises (see 1 Inst. 53) the court will not enjoin; nor if the reversioner or remainderman in fee be not made a party, who possibly may approve of the waste.

In DOHERTY *v.* ALLMAN (1878) L. R. 3 App. Cas. 709, 724. It appeared that two leases were granted on pieces of land with some buildings on them in 1798 for 999 years, the other in 1824 for 988 years. The premises had been used as corn stores for some years; afterwards for artillery barracks. As they were unoccupied and dilapidated, the lessee bethought him of turning the stores into dwelling houses whereby he would put money in his purse as well as benefit realty. The lessor however sought to enjoin him and filed his bill alleging waste. The injunction was refused, Lord O'HAGAN saying:

Now we have, I think, established for the purposes of this decision the principles in this case by which we ought to abide. In the case of Mollineux *v.* Powell, 3 P. Wms. 268, n. (F), which contains the clearest dictum we have upon the matter, two conditions as to the exercise of jurisdiction in cases of waste have been very clearly pointed out, and one at least of those conditions is expressly recognized afterwards in the Irish case of Coppinger *v.* Gubbins, 3 J. & Lat. 411. Those conditions are that the waste with which a Court of Equity, or your Lordships acting as a Court of Equity, ought to interfere, should be not ameliorating waste, nor trivial waste. It must be waste of an injurious character—it must be

[1] In addition to the parties enumerated in the text who may enjoin the commission of waste, the following may enjoin or be enjoined:

An executory devisee, Robinson *v.* Litton, 1744, 3 Atk. 209; a contingent remainderman in general, University *v.* Tucker, 1888, 31 W. Va. 621; a devisee in fee with an executory devise, Turner *v.* Wright, 1860, 2 De G. F. & J. 234.

waste of not only an injurious character, but of a substantially injurious character, and if either the waste be really ameliorating waste—that is, a proceeding which results in benefit and not in injury—the Court of Equity, and your Lordships acting as a Court of Equity, ought not to interfere to prevent it. I think that is perfectly well established. On the other hand, if the waste be so small as to be indifferent to the one party or the other—if it be, as has been said by a great authority in our law, such a thing as twelvepence worth of waste, a Court of Equity, and your Lordships acting as a Court of Equity, ought not to interfere on account of the triviality of the matter. Now, in my view of the case, those principles decide the question so far as this portion of it is concerned; for it appears to me that we have here established to the full satisfaction of your Lordships, by a series of authorities to which I shall not refer, that the waste, to be of any sort of effect with a view to an injunction, must be a waste resulting in substantial damage. Your Lordships are the judges not only of the propriety of exercising your discretion, but of the facts by which the exercise of that discretion ought to be regulated. Now, with reference in the first place to the materiality of the waste, we have in the analogy of proceedings in the courts of law a very important guide for the exercise of our equitable jurisdiction. It is established not only in The Governors of the Harrow School *v.* Alderton, 2 B. & P. 86, before Lord Eldon, but in every case, that if there be a trial at law, and if the result of such trial is that the jury is compelled to give nominal damages, such as three farthings in that case, the verdict will be entered, not for the man who obtained the nominal damages, but for the defendant in the case. It is rather an extraordinary jurisdiction, no doubt—it is an equitable jurisdiction exercised by a court of law—but it seems to be quite established and quite recognized, and being so I think it is impossible to say that when we come to exercise our jurisdiction, which is a discretionary jurisdiction, we should act upon any other principle, or to say that if we see that the damage has not really been substantial and important, we should do that in a Court of Equity according to our discretion, which even in the strictness of a court of common law is not done because of the reason given."

MEUX *v.* COBLEY.

In the Supreme Court of Judicature, Chancery Division, 1891.

[*Law Reports* (1892) 2 *Chancery Division* 253.]

Under an agricultural lease, in 1889, of a farm near London, consisting of arable and pasture land, the lessee covenanted to yield up the premises at the end of the term, together with all fixtures and "improvements" which might during the term be fixed to or erected on the demised

premises, except such fixtures as should be erected by the lessee, and which he should be at liberty to remove in case the lessor should object to purchase the same by valuation; and also that he would "in all respects cultivate and manage the farm, and every part thereof, in a good, proper, and husbandlike manner, according to the best rules of husbandry practised in the neighbourhood." The lessee converted part of the demised premises into a market garden, erecting glass-houses thereon for the cultivation of hothouse produce for the London market. The lessor brought an action for an injunction to restrain the lessee from converting the farm into a market garden, alleging that his doing so was a breach of covenant and was waste, causing injury to the inheritance. At the trial it was proved that other farms in the neighbourhood had been converted into market gardens, that being found to be the most profitable mode of cultivation."[1]

KEKEWICH, J.[2] Now, is what the Defendant is doing waste? Perhaps, technically, it is. But supposing it to be technically waste, it does not follow that the Plaintiff would recover damages; and if it followed that he would recover damages, it by no means follows that he would get an injunction.

The case of Jones *v.* Chappell, Law Rep. 20 Eq. 539, was referred to usefully, because there Sir GEORGE JESSEL sums up the law shortly in this way, Ibid. 541: "The erection of buildings upon land which improve the value of land is not waste. In order to prove waste you must prove an injury to the inheritance." That is borne out by many cases, including Governors of Harrow School *v.* Alderton, 2 Bos. & P. 86, where, on the Plaintiff obtaining a farthing damages, the Defendant got leave to enter judgment for himself. But I think it unnecessary to refer to any other case on this point except Doherty *v.* Allman, 3 App. Cas. 709. That case seems to me to be entirely consistent with Jones *v.* Chappell, and to lay down the law in a manner applicable to this case. Besides the passage which was read from Lord CAIRNS' speech, Ibid. 722, there is another passage immediately following, which I think was not read, but which seems to me also in point. His Lordship said, Ibid. 723: "I doubt, further, whether it must not be taken as clear from the evidence here that any jury, or any tribunal judging upon the question of fact, would not say that, if there be technically what in the eye of the Common Law is called waste, still it is that ameliorating waste which has been spoken of in several of the cases cited at the Bar. That which is done if it be technically waste—and here again I will assume in favour of the appellant that it is technically according to the Common Law, waste—yet it seems to me to be that ameliorating waste which so far from doing injury to the inheritance, improves the inheritance." Lord BLACKBURN went into the same point, and says, App. Cas. 733: "But even supposing there was an injury, and that there was something for which there might

[1] The statement of the case is taken from the headnote.

[2] Only part of the opinion is printed relating to waste.

be damages recovered, is it obligatory upon a Court of Chancery to grant an injunction to prevent it under all circumstances? I think not." So again Sir GEORGE JESSEL, in the case of Jones *v.* Chappell, Law Rep. 20 Eq. 539, to which I have already referred, says, Law Rep. 20 Eq. 542, that the landlord would be entitled to an injunction against the tenant "if the injury were sufficiently serious."

So that all that is asked here being an injunction—and rightly so, because, unless the injunction is granted the Plaintiff will get nothing worth having—the question I have to consider is, is there any damage, any injury to the inheritance? It has been proved to me conclusively, that what the Defendant is doing, so far from being an injury to the inheritance, is of the greatest possible advantage; and that the addition of these houses, if they are substantially built, and if they are kept in good order, is a most advantageous addition to a farm of this kind in the neighbourhood of London.[1]

DOUGLASS AND OTHERS *v.* WIGGINS AND ANOTHER.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1815.

[1 *Johnson's Chancery* 435.]

This was a bill for an injunction, to stay waste. It stated, that the defendants had taken a lease of a dwelling house in Pearl street, in the city of New York, for four years, from the first of May, 1815; that the lease provided, that the defendants were to lay out 300 dollars in improvements, to be approved of by the lessors; that, against the consent of the lessors, the defendants were converting the whole dwelling house into a store, and were prostrating partitions, and cutting through the ceilings and floors in the second and third stories, and fixing a wheel and tackle in the third story to raise heavy packages, which would be to the great and constant injury of the building, as the timbers in the third story were weak.

Anthon, for the plaintiffs, cited Bonnett *v.* Sadler, 14 Ves. 526. Amb. 209. Anon. and Bacon, tit. Waste, c. 5.

The Chancellor. Let the injunction issue.

Motion granted.

[1] Inasmuch as waste is an injury to the inheritance, it follows that a positive improvement to the freehold should not be waste, at least not in a court of equity. See Winship *v.* Pitts, 1832, 3 Paige 259; Shine *v.* Wilcox, 1837, 1 Der. & Bat. Eq. 631; Sherrile *v.* Connor, 1890, 107 N. C. 630; Keeler *v.* Eastman, 1839, 11 Vt. 293; Pynchon *v.* Stearne, 1846, 11 Met. 304, per WILDE, J. Smith *v.* Carter, 1853, 18 Beav. 78, contra, is generally discredited.

KLIE *v.* VON BROOCK.

IN THE COURT OF CHANCERY OF NEW JERSEY, 1897.

[56 *New Jersey Equity* 18.]

The defendants obtained permission from the Hoboken Land and Improvement Company to cut the doorway through the partition wall, but, clearly, that company could not give them the right to do so without the permission of the complainants, who owned one-half of the wall. And the result is the same whether we consider that ownership as of the particular one-half which was on their side of the line or as to the undivided one-half of the whole. The question, then, is whether or not, under the terms of the lease, the defendants acquired such a right in the premises as authorized them to make the opening.

The opening, as first made, was between four and five feet wide and seven or eight feet high. The bricks and mortar were actually removed, and these composed an essential part of the building itself.

PITNEY, V. C. Now, it seems to me too plain for argument that such an abstraction amounted to waste at the common law. It was a "spoil" and "destruction," *pro tanto,* of the building. 2 Bouv. Law Dict. tit. "Waste;" 6 Jac. Law Dict. tit. "Waste" 393 (at p. 399), where the author uses this language, citing authorities:

"If a lessee flings down a wall between a parlor and a chamber, by which he makes a parlor more large, it is waste; it cannot be intended for the benefit of the lessor, nor is it in the power of the lessee to transpose a house. So, if he pulls down a partition between chamber and chamber, it is waste. Or, if a lessee pulls down a hall or parlor and makes a stable of it, it is waste. If a lessee pulls down a garret overhead, and makes it all in one and the same thing, it is waste. Breaking of a wall covered with thatch, and of a pale of timber covered, is waste."

To the same effect precisely are 7 Bac. Abr. tit. "Waste" (at p. 256) and Tayl. Land & T., § 348; Kerr. Inj. 250, 251, where the author says:

"An alteration of buildings which changes their nature and character is waste, even although the value of the premises be thereby increased. Thus, the converting two chambers into one, or *e converso,* or the converting a hand-mill into a horse-mill, or a corn-mill into a fulling-mill, or a malt-mill to a corn-mill, or a logwood-mill to a cotton-mill, have been held to be waste. So, also, the conversion of a private house into a shop is waste. So, also, may the building of a new house where there was one before be waste if it impair the evidence of title."

And he cites Lord ROMILLY, in Smith *v.* Carter, 18 Beav. 78, for

authority that a tenant will be restrained from pulling down a house and building another, which the landlord objected to. "It is not sufficient," said his lordship, "that the house proposed to be built is a better one. The landlord has a right to exercise his own judgment and caprice whether there shall be a change; if he objects the court will not allow a tenant to pull down one house and build another in its place."

And see 1 Wash. Real. Prop. 113, where the learned author adopts the rule as laid down by Lord ROMILLY.

This restriction on the right of a tenant for years is based upon the character of his tenancy. "He has the use, but not the dominion of the property." Farrant *v.* Thompson, 5 Barn. & Ald. 826, per Mr. Justice HOLROYD.

Evidence was given as to whether or not the destruction in this case materially injured the party wall. I think that the weight of the evidence is that it did materially injure it. The wall itself, being only twelve inches in thickness, was, at best, a very slight affair to maintain a four-story building; so much so, that it will, sooner or later, require a shoring on each side. Now it seems to be contrary to common knowledge and common sense to say that taking out and absolutely abstracting a piece of the wall four or five feet wide and seven or eight feet high, will not weaken it, and materially weaken it. A contrary view would result in holding that several such openings could be made in this wall without injuring the building.

Then the evidence satisfies me that the attempt to properly secure and support the wall over the opening was not well carried out, and was not successful. New jambs of brick were added to the ragged edges of the opening, in order to make it square and proper to be stopped by doors. Those jambs, being of new material, required the greatest care in their construction in order to make them unite and be homogeneous with the old work, but the complainants' architect swears that upon an inspection made during the hearing he found a crack and opening between the new and the old work. Then iron beams or lintels were placed upon these new jambs to sustain the weight of the wall above. The architect in question gave it as his opinion—and I agree with him—that the proper mode of sustaining those lintels was to place them upon iron plates, placed in turn upon the top of the old part of the wall on each side, and then to key them up with iron wedges so as to make them bear up and press against the old brick work. Instead of this, they were simply laid upon the bare bricks of the new jambs, which, as we have seen, were, from defective construction, insufficient for that purpose. The result of this mode of adjusting them was to render them substantially useless so far as regards preventing any subsidence in the wall above the opening. The architects called by the defendants swear that the opening was made in the usual manner, and well done. But I cannot accept their judgments on this subject. It seems to me they are not sound.

But, in my judgment, the test in such a case is not alone whether a

material injury is done to the building, but whether it is altered in a material manner, and to an extent beyond what is fairly implied from the terms of the original contract of letting.

It is said by the treatise writers, and authorities are cited for the position, that the severity of the ancient rule of waste has been relaxed, and that many alterations are now held not waste, which in ancient times would have been held as waste. I have examined the cases which are said to illustrate this modification, and my conclusion is that in most of them a permission by the owner to the tenant to alter and change the building is either found in the terms of the demise, or is to be implied from the circumstances of the case. Thus, if the owner of a dwelling in a neighborhood which is rapidly being converted from a dwelling region into a business region, lets it to a party for a long term of years, knowing that he expects to use it for business purposes, that, by implication, is permission to him to make such alterations as are necessary and usual for that purpose. And so where a demise is made for a great number of years—say one hundred or two hundred—for a fair rental value of the premises, there it must be presumed that the parties intended that the tenant for years should have well-nigh unrestricted use of the premises, provided he does not reduce their rental value. For, in such a case, the reversion, independent of the rent, is of mere nominal value.

So, I should say that if a building be erected and let for a hotel, and through oversight or miscalculation some mistake in the interior arrangements occurs which materially interferes with its beneficial use for that purpose, and requires a change, it is probable that the right to make such change could properly be inferred from the circumstances. An illustration is found in this case. At the special request of the tenants the landlords divided the basement into two parts by a cross-wall of brick, not a part of the original plan and not necessary for the support of the building. This was done in order to keep the heat of the range in the kitchen from penetrating to the front part of the basement. When the building came into actual use it was found that this wall was an injury rather than a benefit, and was in whole or in part removed by the defendants. They assert that it was done with the consent of the landlords; but the landlords deny this. Be that as it may, I think it was not waste, and its removal was not relied upon as part of complainants' case.

The cases in this country relied upon to show an amelioration of the strict English rule are Jackson *v.* Tibbits, 3 Wend. 341, and Winship *v.* Pitts, 3 Paige 259.

Jackson *v.* Tibbits was an ejectment by landlord against tenant, based upon waste committed by the tenant in the leased premises, which were a tavern in the village of Utica, and the waste was the cutting a door between two rooms in the second story, and putting a window in the door of the cellar kitchen. It appeared that they were beneficial, and not injurious, to the premises. The judge, at the trial, charged the jury

that they amounted to waste and worked a forfeiture of the defendants' rights in all the premises. There was evidence, however, of waiver by the plaintiff of the waste. The opinion was *per curiam,* by Mr. Justice MARCY, and he granted a new trial, not only on the ground that the act committed was not waste, but also that, according to the authorities, the whole premises were not forfeited, but only the part wasted; and further, that there was proof from which the jury might have inferred a waiver. Of course, in considering the effect of this case, and others like it, we must bear in mind that the courts are always anxious to save an actual forfeiture of the term.

Winship *v.* Pitts, *supra,* was decided by Chancellor WALWORTH. There a tenant of a corner lot, which had vacant land in the rear abutting on a side street, proposed to erect a stable there, and the landlord, owning other property in the neighborhood, filed a bill for an injunction. The Chancellor held that the mere erection of a stable on vacant land was not waste. In fact, it never was waste; a *dictum* to the contrary by Lord COKE was very shortly afterward overruled.

After a full review of all the cases in both countries, Professor Dwight, sitting in the commission of appeals, in Agate *v.* Lowenbein, 57 N. Y. 604, declares that "there can be no pretence of any relaxation of the rule against waste in the case of tearing down houses or taking away inner walls or partitions. It would be difficult to set any limits to such acts by judicial decisions. Where such changes are desired they should be left to the agreement of the parties." In this view I heartily concur.

Then there is a distinction taken by the judges between an alteration in the outside walls of a building forming a property boundary and those more trifling alterations which may be made in the interior partitions—taking away or cutting a door through an interior partition or altering a street window into a door. As late as 1817 Lord ELLENBOROUGH, after hearing the most distinguished counsel of the day, held that the cutting of a doorway through the outside wall of a demised house into an adjoining house and keeping it open for a long space of time, amounted to a breach of a covenant to repair, which was a continuing breach, and which caused a forfeiture and entitled the landlord to recover in an action of ejectment against his tenant. Doe, *ex dem.* Vickrey, *v.* Jackson, 2 Stark, 260.

In Doe *v.* Jones, 4 B. & Ad. 126, attempt was made to forfeit a lease on account of a breach of covenant to repair. The term was for forty years, and the lease contained a covenant to keep in repair the premises "and all such buildings, improvements and additions as shall be made by the lessee during the term," with a proviso for re-entry in case of breach. The lessee changed the lower windows opening on the street, and stopped up a doorway, making a new one in a different place in an interior partition of the house, and it was held that there was no waste because it appeared that the changes were not injurious and were con-

templated by the language of the lease. Doe *v.* Jackson, *supra,* was cited, but the judges distinguished it on the ground that in that case the breaking was of a wall between two houses, and not in an interior partition of the house.

Young *v.* Spencer, 10 B. & C. 145, was an action on the case by landlord against tenant for injury to the leased premises. It appeared that the defendant had opened a door from the house into the street, and the jury found specially that no injury was done to the house itself or to any of the other houses owned by the plaintiff on that street. The judge directed a judgment for the plaintiff, but the court held that it was for the jury to say whether there was any injury to the plaintiff's reversionary right, and granted a new trial.

Some of the authorities cited by the defendants' counsel were cases of equitable waste, and so not applicable here; the distinction being that equitable waste is an abuse by a tenant, without impeachment of waste, of his legal right to commit waste.

I can find no authority holding that a breach in and partial destruction of a wall dividing the demised premises from those adjoining owned by another party is not waste.

In the present instance there can be no pretence that the right to make such a breach can be implied from anything contained in the contract or found in the circumstances surrounding its inception and conclusion. The building was designed especially for a restaurant, to be used in connection with the complainants' liquor saloon, and the defendants were consulted and knew and agreed to all the details of its construction. Indeed, in their answer they claim a greater voice in those details than the complainants admit. It was not contended that, as constructed, it did not answer the expectation of the parties. There was and can be no pretence that the change effected by the opening in question tends to make the building more convenient for the use for which it was designed and leased.

These considerations lead to the conclusion that the case is not covered by any well-considered authority in which tenants have been held justified in changes of this character.

Fourth, as to the remedy.

In the prayer of complainants' bill they ask that the defendants may be ordered either to restore the opening in the party wall, or to give security for its restoration at the end of the term. By thus praying for alternative relief I understand that the complainants did not intend to give to the defendants an option of submitting to the latter remedy, but simply to ask that the court should give it if the first remedy of immediate restoration was not considered by the court proper and equitable. The defendants, by their answer, and at the hearing, offered to give security for restoration at the end of the term, but complainants at the hearing insisted upon immediate restoration.

It is well settled that complainants are entitled to immediate relief,

and are not obliged to wait until the end of the term. Agate *v.* Lowenbein, 57 N. Y. 604, and cases cited at p. 612 *et seq.*

In the present case the waste was committed against the known wishes and protest of complainants, and with such haste that it was substantially completed before complainants could obtain preventive relief from this court.

In the somewhat similar case of Bonnett *v.* Sadler, 14 Ves. 526, Lord ELDON did not think it inequitable. In that case the complainants were the proprietors of a carriage factory and salesroom, and owned an adjoining house, which was a dwelling. The defendants leased the dwelling, concealing from the complainants the fact that they intended to set up a rival establishment, and after getting possession proceeded to change the front and interior of the building so as to make it fit for that purpose, and Lord ELDON remarked upon their conduct in that respect as inequitable. And Lord SELBORNE, in Goodson *v.* Richardson, L. R. 9 Ch. App. 221, 1874, at p. 224, spoke approvingly of a landowner, who was interested in a water company, standing on his strict rights in equity to prevent a rival company from laying its water mains in the street in front of his lands.

The presumption is that the restriction against selling liquors contained in the lease affected the amount of the rent. At all events, the complainants are entitled to the benefit of their contract, and are justified in using all legal means to preserve it.

For these reasons complainants, in my judgment, have a clear right to relief in this court.

The authorities justify the use of a mandatory injunction in such cases. The leading case is Vane *v.* Lord Barnard, 2 Vern, 738, known as the Raby Castle Case. This was followed by Rolt *v.* Lord Somerville, 1737, decided by Lord HARDWICKE and reported in 3 Eq. Cas. Abr. at p. 759, where there was a cutting of trees and also pulling down houses and buildings. The prayer was that the premises might be restored. Lord HARDWICKE said that he could not compel the restoration of the trees, but he said, " yet, as to the pulling down the houses and buildings and laying the lead pipes they may be restored or put in as good condition again," citing with approbation the case of Vane *v.* Lord Barnard.

I think the present a proper case for immediate restoration.

I will advise a decree that the defendants be restrained from permitting the opening in the party wall, made by them on or about May 10th, 1896, to remain in its present condition, or from permitting the party wall between the leased premises and those of the Hoboken Land and Improvement Company on the west, to be in any other condition than it was prior to the opening made therein by the defendants; and further, if complainants desire themselves to do the work of restoration, then that the defendants be restrained from preventing the complainants from so doing, at a reasonable time and in a reasonable manner, and the court

will name a special master, under whose supervision the work of restoration shall be done, if the parties cannot agree thereupon. The provision for restoration may also include the window opening upon the area, if the brickwork has not already been restored to its original condition.[1]

WHITFIELD *v.* BEWIT.

IN CHANCERY, BEFORE LORD CHANCELLOR MACCLESFIELD, 1724.

[2 *Peere Williams* 240.]

One seised in fee of lands in which there were mines, all of them unopened, by deed conveyed those lands and all mines, waters, trees, etc., to trustees and their heirs, to the use of the grantor for life (who soon after died), remainder to the use of A. for life, remainder to his first, etc., son in tail male successively, remainder to B. for life, remainder to his first, etc., son in tail male successively, remainder to his two sisters C. and D. and the heirs of their bodies, remainder to the grantor in fee.

A. and B. had no sons, and C., one of the sisters, died without issue, by which the heir of the grantor, as to one moiety of the premises, had the first estate of inheritance.

A., having cut down timber, sold it and threatened to open the mines; the heir of the grantor being seised of one moiety *ut supra* by the death of one of the sisters without issue, brought this bill for an account of the moiety of the timber and to stay A.'s opening of any mine.

[1] "The American doctrine on the subject of waste is somewhat varied from the English law and is more enlarged, and better accommodated to the circumstances of a new and growing country," 4 Kent's Commentaries 76; see also the opinion of VAN SYCKEL, J., in Gaines *v.* Green Pond Iron Co. *et al.*, 1881, 33 N. J. Eq. 603.

"The doctrines of the Common Law, however, require considerable modifications when they are applied to social, domestic, and political conditions different from those which prevail in the country of its origin. And their inherent wisdom is strikingly manifested in the ease and flexibility with which they were adapted to new and altered circumstances. The law of waste, as understood in England, would have made it impossible for tenants to cultivate the wild lands of this country." Per BRYAN, J., in Crowe *v.* Wilson, 1886, 65 Mo. 479, 481.

"Following the same general line of reasoning, it was early held in the United States that, while the English doctrines as to waste was a part of our American law, still the cutting of timber in order to clear up wild land and fit it for cultivation, if consonant with the rules of good husbandry, was not waste, although such acts would have been clearly waste in England." Per WINSLOW, J., in Melrose *v.* Pabst Brewing Co., 1899, 104 Wisc. 7, 11.

1st Obj. As to the plaintiff's claim of the moiety of the moneys arising by sale of the timber, in regard the plaintiff comes into equity for the same, it would be more agreeable to the rules of equity that the moneys produced by the timber should be brought into court and put out for the benefit of the sons as yet unborn and which may be born. That these contingent remainders being *in gremio legis* and under the protection of the law, it would be most reasonable that the moneys should be secured for the use of the sons when there should be any born; but as soon as it became impossible there should be a son, then a moiety to be paid to the plaintiff; and the case would be the same if there were a son *in ventre sa mere;* or the plaintiff might bring trover, and then what reason had he to come into equity?

Cur.: The right to this timber belongs to those who at the time of its being severed from the freehold were seised of the first estate of inheritance, and the property becomes vested in them.

As to the objection that trover will lie at law, it may be very necessary for the party who has the inheritance to bring his bill in this court, because it may be impossible for him to discover the value of the timber, it being in the possession of, and cut down by, the tenant for life. This was the very case of the Duke of Newcastle *v.* Mr. Vane, where at Welbeck (the Duke's seat in Nottinghamshire) great quantities of timber were blown down in a storm; and though there were several tenants for life, remainder to their first and every other son in tail, yet these having no sons born, the timber was decreed to belong to the first remainderman in tail.

Neither do I think the defendant ought (as he insists) to be allowed out of this timber what money he has laid out in timber for repairs, since it was a wrong thing to cut down and sell the same, and shows *quo animo* it was done, not to repair but to sell.

Secondly, it was urged that the mines, being expressly granted by this settlement with the lands, it was as strong a case as if the mines themselves were limited to A. for life, and like Saunder's Case in 5 Co. 12, where it is resolved, that on a lease made of land together with the mines, if there be no mines open, the lessee may open them; so in this case, there being no mines open, the *cestui que use* for life might open them.

But Lord Chancellor, *contra.* A. having only an estate for life subject to waste, he shall no more open a mine than he shall cut down the timber trees, for both are equally granted by this deed; and the meaning of inserting mines, trees, and water was, that all should pass, but as the timber and mines were part of the inheritance, no one should have power over them but such as had an estate of inheritance limited to him.

Of which opinion was Lord Chancellor KING on a rehearing.

BEWICK *v.* WHITFIELD.

IN CHANCERY, BEFORE LORD CHANCELLOR TALBOT, 1734.

[3 *Peere Williams* 267.]

A. was tenant for life, remainder to B. in tail, as to one moiety, remainder as to the other moiety to C. an infant in tail, remainder over. There was timber upon the premises greatly decaying; whereupon B. the remainderman, brought a bill, praying, that the timber that was decaying might be cut down and that the plaintiff the remainderman in tail, together with the other remainderman, the infant, might have the money arising by the sale of this timber. On the other hand, the tenant for life insisted to have some share of this money.

Lord Chancellor. The timber, while standing, is part of the inheritance; but whenever it is severed, either by the act of God, as by tempest, or by a trespasser and by wrong, it belongs to him who has the first estate of inheritance, whether in fee or in tail, who may bring trover for it; and this was so decreed upon occasion of the great windfall of timber on the Cavendish estate.

Secondly. As to the tenant for life, he ought not to have any share of the money arising by the sale of this timber; but since he has a right to what may be sufficient for repairs and botes, care must be taken to leave enough upon the estate for that purpose; and whatever damage is done to the tenant for life on the premises by him held for life, the same ought to be made good to him.

Thirdly. With regard to the timber plainly decaying, it is for the benefit of the persons entitled to the inheritance, that it should be cut down, otherwise it would become of no value; but this shall be done with the approbation of the Master; and trees, though decaying, if for the defence and shelter of the house, or for ornament, shall not be cut down. B., that is, the tenant in tail (and of age), of one moiety, is to have a moiety of the clear money subject to such deductions as aforesaid, the other moiety belonging to the infant, must be put out, for the benefit of the infant on government or real securities, to be approved of by the Master.

BATEMAN *v.* HOTCHKIN.

IN CHANCERY, BEFORE LORD ROMILLY, M. R., 1862.

[31 *Beavan* 486.]

A question arose as to the right of a tenant for life impeachable for waste to a fund derived partly from wood blown down by a storm.

The question was brought before the Master of the Rolls in Chambers, who gave the following opinion in writing:—

"That in the case of waste committed by a tenant for life by cutting

timber, the produce of the sale of it is part of the inheritance, and as the tenant for life can gain no advantage by his own wrongful act, the produce is invested and accumulated for the benefit of the first estate of inheritance.

"In the case of timber blown down by a storm, there is no waste, because it is the act of God, but the produce of the sale of it belongs to the inheritance, that is, the money must be invested in consols, and the interest paid to the tenant for life."

Mr. Speed for the plaintiff.

Mr. C. Hall for the tenant for life.

The Master of the Rolls. I am of opinion that the tenant for life is entitled to have the benefit of the sale of all such trees felled by the wind as he would be entitled to cut himself, and to all fair and proper thinnings, and to all coppices cut periodically in the nature of crops.

There must be an inquiry to ascertain what part of the fund is derived from timber or cuttings within that description.

In re BARRINGTON.

GAMLEN *v.* LYON.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION, 1886.

[*Law Reports,* 33 *Chancery Division* 523.]

Francis Lyon Barrington was owner in fee of certain coal mines at Binchester in the County of Durham, but not of the surface above such mines. These coal mines were worked at certain royalties under a lease granted by Mr. Barrington for a term of thirty-one years from the 1st of May, 1872. By his will, dated the 1st of December, 1876, Mr. Barrington devised his collieries at Binchester (subject to a mortgage and an annuity) to trustees upon trust for the Dowager Viscountess Barrington for life without impeachment of waste, and after her death for the defendant, the Hon. Francis Bowes Lyon, for life without impeachment of waste, with limitations over. The testator died on the 15th of January, 1877, and Lady Barrington died on the 23rd of March, 1883.

During her lifetime and after her death certain of the coal was got by the owners of neighbouring collieries working by instroke from their collieries, such neighbouring owners having inadvertently thus trespassed beyond their proper boundaries. This working began in October, 1882; the mistake was discovered in December, 1884, when the working was discontinued; and the neighbouring owners subsequently paid the

sum of £839 7s. 2d. as compensation for the coal which they had thus gotten.

KAY, J.[1] (after stating the facts with reference to the coal won by the innocent trespass of the owners of adjoining collieries, continued):—

The question is to whom the moneys in respect of such trespass belong. The point seems to be completely determined by authority. No doubt, if a tenant for life who is impeachable of waste improperly commits waste by cutting trees or digging minerals, such trees or minerals when severed become at once the property of the owner of the first estate of inheritance *in esse*. Uvedall *v.* Uvedall, 2 Roll. Abr. 119; Whitfield *v.* Bewit, 2 P. Wms. 240; Bewick *v.* Whitfield, 3 Ibid. 267. And in such case an intermediate tenant for life without impeachment or waste cannot recover the proceeds in trover. Pigot *v.* Bullock, 1 Ves. 479, 484. The reason for this seems to be that he had no right to the timber cut before his estate came into possession.

The same law applies the timber be severed by the act of God, as by tempest, or by a trespasser: see Bewick *v.* Whitfield.

On the other hand, if the severance be in the lifetime of a tenant for life who is unimpeachable of waste the severed portion of the inheritance belongs to such tenant for life. In an anonymous case in Moseley, page 238, the Master of the Rolls stated: "It is now settled at law that if a stranger cut down timber, or commit any other waste, it belongs to the tenant for life, who is dispunishable of waste, and not to the remainderman in tail, or in fee." This was followed by Lord Chief Justice MANSFIELD in Pyne *v.* Dor, 1 T. R. 55, 56, who said, "that a tenant for life without impeachment of waste, has a right to the trees the moment they are cut down."

And in Bagot *v.* Bagot, 32 Beav. 509, and on appeal, 33 L. J. Ch. 122, n, the law as to timber and minerals is treated as being precisely identical.[2]

I am, therefore, of opinion that the proceeds of the minerals worked during the respective lifetimes of Lady Barrington and the defendant belong to her estate and to the defendant respectively.[3]

[1]A portion of the case and of the opinion is omitted.

[2]For a comprehensive and technical definition and enumeration of timber see Honywood *v.* Honywood, 1874, L. R. 18 Eq. 306; Dashwood *v.* Magniac, 1891, 3 Ch. 306.

[3]The law on the subject, together with a collection of cases, is admirably expressed in a recent work of authority from which the following is quoted:

"When the tenant has committed waste by severing from the land something that is a part of the inheritance, as a structure or timber on the land, the thing so severed generally belongs to the owner of the first estate of inheritance, as it does when severed by accident, as by a windstorm.

"A tenant is entitled to the proceeds of such wood as may be rightfully severed by him, whether he makes the severance, or it is the result of a windstorm or other action of the elements; and the same principle applies to the proceeds of other acts which do not involve waste. So, in the case of a

SECTION 2. TRESPASS.

The reasons given, why this bill should not be answered are chiefly three.

1st.[1] That what the plaintiffs complain of is but in nature of a trespass, and for that they may have remedy at law, but to that it may be answered, in some cases even for a trespass a bill is proper enough in this court; as where by the secret contrivance of it a man cannot easily prove it; as, for instance, if a man in his own ground digs a way under ground to my mineral, and the like. Per Lord Keeper NORTH, in East India Company *v.* Landys, 1682, 1 Vernon 127, 129.

COULSON *v.* WHITE.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1743.

[3 *Atkyns* 21.]

Lord Chancellor. Every common trespass is not a foundation for an injunction in this Court, where it is only contingent and temporary; but if it continues so long as to become a nuisance, in such a case the Court will interfere and grant an injunction to restrain the person from committing it.

MOGG *v.* MOGG.

IN CHANCERY, BEFORE LORD CHANCELLOR THURLOW, 1786.

[*Dickens* 670.]

The plaintiff was a trustee of certain estates, and in whom the legal estate was vested: The defendant hath not any right, but persuaded the tenants to cut down timber.

Bill for an injunction to stay waste; and this day the plaintiff moved for an injunction accordingly, upon filing the bill. It was mentioned

tenancy without impeachment of waste, the proceeds of trees or minerals severed from the land, either by the elements or by a stranger, belong to the tenant, as if they were severed by him; and he is also, upon the vesting of his estate in possession, entitled to the proceeds of a severance made during the possession of previous tenants for life, unimpeachable of waste, under the same settlement." 1 Tiffany, Real Property, § 256.

[1]Only the first is given.

on the 11th, but the Lord Chancellor desired Mr. Madocks to see, if he could find an instance, where a stranger comes upon lands as a trespasser, and cuts down timber, or commits waste, in which this court hath granted an injunction to stay him, saying he was liable to an action by which he might be stayed.

On this day, the 13th, Mr. Madocks said he had recollected a case before Lord CAMDEN, C., in which the plaintiff was lord of a manor in Oxfordshire, upon which the defendants claimed a right to estovers, and under that right, they cut down timber in one day to the value of £400; the plaintiff filed his bill for an injunction to stay waste, and obtained one. Upon its being served, their attorney advised the defendants to desist from cutting down any more timber, but advised other tenants of the manor to cut down timber; upon which Lord CAMDEN granted an injunction to stay waste, against persons not parties, and Mr. Madocks argued this as a case in point.

The Lord Chancellor said it did not apply, for in that case there was a right to something in the defendants, though perhaps they carried it beyond what such a right went to; and that until such right was determined, it was very proper to stay them from doing an act, which if it turned out they had no right to do, would be irreparable: but in the present case the defendant had no interest; he was a mere trespasser, and being such, an action of trespass would lie against him; and therefore his Lordship would not grant the motion.

HAMILTON *v.* WORSEFOLD.

IN CHANCERY, BEFORE LORD CHANCELLOR THURLOW, 1786.

[10 *Vesey* 291 *note.*][1]

The bill stated, that the Plaintiff was seised in fee; that his title had but recently accrued; and the tenants had not yet paid him any rent; that the Defendant, Worsefold, pretended to have some claim to the estate; and had given notice to the tenants to pay their rent to him; that he had entered upon the estate with the permission of the other Defendants, the tenants; and had cut timber; and threatened to cut more. The bill therefore prayed, that Worsefold may be restrained from committing waste; and that the tenants may be restrained from permitting it.

The Lord Chancellor, upon the motion for the injunction, at first had some difficulty about granting it; Worsefold being a mere trespasser; but at length his Lordship granted the injunction against both Worsefold and the tenants.[2]

[1] This case was stated from a note by Mr., afterward Sir Samuel Romilly.

[2] Register's Book, A. 1786, folio 1.

MORTIMER *v.* COTTRELL.

IN CHANCERY, BEFORE LORD CHANCELLOR THURLOW, 1789.

[2 *Cox* 205.]

The defendant had for some time acted under a power from the plaintiff as the receiver of several rents of houses belonging to the plaintiff, and had also been authorized by the plaintiff to dig earth in an adjoining brick-field to a certain depth from the surface. The defendant having dug beyond the limit, the plaintiff revoked all powers of attorney made to the defendant, and required him to desist from digging any further; but the defendant continuing to dig, the plaintiff filed this bill, praying that the defendant might be restrained by injunction from digging further on the premises. And the Solicitor-General now moved for an injunction on certificate of the bill filed and affidavit of the fact, and urged that as this ground was intended for building, and as it would be rendered unfit for the foundation of a house if the ground was dug deeper from the surface than the limited depth, this was one of that species of irreparable mischief which this court would prevent by injunction.

But the Lord Chancellor said, the defendant was a mere stranger; that he had been guilty of a forcible entry, and that there was no case where this court would interfere by injunction, when the party was a mere stranger, and might be turned out of possession immediately.

PILLSWORTH *v.* HOPTON.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1801.

[6 *Vesey* 51.]

Mr. Thomson, for the plaintiff, moved for an injunction to restrain the defendant from committing waste. The defendant was in possession: the tenants had attorned; and the plaintiff having brought an ejectment, had failed in it; but, as the bill alleged, not upon the merits.

Lord Chancellor. I do not recollect, that the court has ever granted an injunction against waste under any such circumstances: the defendant in possession; the tenants having attorned: the plaintiff having failed in his ejectment: both setting up pretences of title. I remember perfectly being told from the bench very early in my life, that if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating

that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction.

His Lordship having inquired if the bar knew any instance, and none being produced would not make the order.[1]

MITCHELL *v.* DORS.

IN CHANCERY, BEFORE LORD ELDON, C., 1801.

[6 *Vesey* 147.]

Mr. Mansfield and Mr. Bell moved for an injunction against the defendant; who having begun to get coal in his own ground had worked into that of the plaintiff.

Lord Chancellor. That is trespass, not waste. But I will grant the injunction upon the authority of a case before Lord THURLOW:[2] a person,

[1] "The title appears to be disputed; for the defendant has been in possession for a long time, and has joined issue with the plaintiff at law on the question of title, and the action is still pending undetermined. Under these circumstances I do not feel myself authorized to grant the injunction.

"In Field *v.* Jackson, Dickens, 599, the Lord Chancellor held it to be a general rule, that when the right was doubtful, the court would not grant an injunction. So, in a case before Lord ELDON, Pillsworth *v.* Hopton, 6 Ves. 51, an injunction to restrain waste was not granted against a defendant in possession, claiming by an adverse title. If the plaintiff, in his bill states such a claim on the part of the defendant, he states himself out of court, as to the injunction. In the present case the bill does state to that effect, when it states that the defendant has been a long time in possession, and has joined issue with the plaintiff in ejectment. I must know the result of that issue at law before I can interfere." Per KENT, in Storm *v.* Mann, 1819, 4 Johns. Ch. 21.

"The particular title must be set out: an affidavit merely that the plaintiff has a fee simple is not sufficient." Whitelegg *v.* Whitelegg, 1770, 1 Bro. C. C. 58.

"This rule, i. e., that the plaintiff must show his title clearly, is a simple recognition that one is not entitled to invoke the extraordinary powers of a court of equity unless he can establish in a manner satisfactory to the law that he will suffer an irreparable injury in his estates. Unless the estates be his, he can suffer no injury, and unless the title be in him, there is no estate." Per ATKINSON, J., in Flannery *v.* Hightower, 1895, 97 Ga. 592, 602.

[2] Flamang's Case, cited by the Lord Chancellor in Hanson *v.* Gardner, 1802, 7 Ves. 305, 307, in which his Lordship said:

"The law as to injunctions has changed very much; and lately they have been granted much more liberally than formerly they were. . . . I remember, when in a case of trespass, unless it grew to a nuisance, an injunction would have been refused: and even in the case of waste, if by temporary

landlord of two closes, had let one to a tenant, who took coal out of that close, and also out of the other, which was not demised; and the difficulty was, whether the injunction should go as to both; and it was ordered as to both.

The order was made.

SMITH *v.* COLLYER.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1803.

[8 *Vesey* 89.]

A motion was made to restrain the defendant from cutting timber.

The plaintiffs claimed under a general devise to them and their heirs of all and every the devisor's lands, etc., as well freehold as copyhold, and all other his real estates whatsoever and wheresoever. The estates were in mortgage: but the plaintiffs by their guardians were in receipt of the rents. The defendant put in an answer; claiming as nephew and heir at law; insisting that the will was not well executed.

The Lord Chancellor said, this was quite a new case.

Mr. Cooke, in support of the motion.

The plaintiffs have no means of preventing or redressing this at law: the mortgagee having the legal title; and the mischief will be irremediable; no damages would be a compensation; and that is a ground for the jurisdiction; as was held in the Duke of Somerset *v.* Cookson, 3 P. Will. 389, and Pusey *v.* Pusey, 1 Vern. 273; in which cases an action might have been brought. In this case they both claim under the same person; and the defendant is not in possession; as in Pillsworth *v.* Hopton, 6 Vesey, 51.

The Lord Chancellor. I do not recollect any instance of this sort. The defendant denies that the plaintiffs are devisees. It is not waste, but trespass upon their own showing. There was no instance of an injunction in trespass till the case before Lord THURLOW upon a mine; to which

acts, from time to time merely, the subject of an action, and not bringing along with it irreparable mischief, Lord HARDWICKE thought, it was granted only as following the relief. Lord THURLOW had great difficulty as to trespass. I have a note of a remarkable case, in which the name of one of the parties was Flamang. There was a demise of close A. to tenant for life; the lessor being landlord of an adjoining close B. The tenant dug a mine in the former close. That was waste from the privity. But when we asked an injunction against his digging in the other close, though a continuation of the working in the former close, Lord THURLOW hesitated much; but did at last grant the injunction: first from the irreparable ruin of the property, as a mine; secondly as it was a species of trade; and thirdly, upon the principle of this Court enjoining in matter of trespass, where irreparable damage is the consequence."

I have alluded; which, though trespass, was very near waste. In that case, the first instance of granting an injunction in trespass, there was no dispute whatsoever about the right. Here the right is disputed. It was always surprising to me that the jurisdiction by injunction was taken so freely in waste, and not in trespass; for there is a writ at common law after action to restrain waste. But a trespass after one action may be repeated. I remember, when, if a plaintiff stated that the defendant claimed by an adverse title, he stated himself out of court.

COURTHOPE *v.* MAPPLESDEN.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1804.

[10 *Vesey* 290.]

A motion was made by a landlord for an injunction to restrain cutting and moving timber, and committing any other waste: the plaintiff charging collusion by the defendant with the tenant.

Mr. Hollist and Mr. Leach in support of the motion.

Though in Mogg *v.* Mogg, 2 Dick. 670, an injunction under these circumstances was refused, Lord THURLOW very soon afterwards, in Hamilton *v.* Worsefold, 5 Ante, altered his opinion and granted his injunction. There was in that case no privity of estate between Worsefold and the plaintiff. The old rule was, that if a tenant suffers a third person to come upon the land and cut timber, he is himself guilty of waste. This case is the same: a person without right, after the tenant has attorned, coming upon the land without the privity of the landlord, and cutting timber: it is waste in both. The utmost the plaintiff could do is to go and carry away the timber; suffering all the disadvantage of having it cut at an improper time. He cannot go upon the land to stop another person cutting timber.

The Lord Chancellor. I have no difficulty in granting the injunction in this case; but I will not be bound as to what is to be done upon a mere trespass; though it is strange that there cannot be an injunction in that case to prevent irreparable mischief: the rather, as there is a writ at common law to prevent the farther commission of waste during the trial; whereas, if the court will not interfere against a trespasser, he may go on by repeated acts of damage, perfectly irreparable. But the ground in this case is, that the trespass partakes of the nature of waste more than in general cases: the tenant colluding; and if the tenant's act is waste, the act of the other must have so much of the quality of the tenant's act as to make it the object of an injunction.

CROCKFORD *v.* ALEXANDER.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1308.

[15 *Vesey* 138.]

The plaintiff having contracted to sell an estate to the defendant, the latter obtained possession from the tenant, and began to cut timber; upon which the bill was filed, and a motion made for an injunction.

Mr. Cullen, in support of the motion, observed that this was a case of trespass.

The Lord Chancellor. Although at law this defendant is a trespasser, he is in equity by the effect of the contract the owner of this estate; having taken possession under the contract; and the vendor is in the situation of an equitable mortgagee. This court has occasionally granted an injunction in cases of trespass as well as waste; and, having thought much upon this subject, I will grant this protection against cutting timber, until the power of the court to grant the injunction against trespass shall be fully discussed. Lord THURLOW refused the injunction in this case. A man, possessed of two fields, demised one, with the mines under it: the lessee found his way, working under ground, to the mines under the other field, which was not demised. Lord THURLOW held that to be trespass, not waste; and did not grant the injunction. There are, however, several cases, furnishing principles of analogy. In Lord Byron's Case it was destruction, not waste: there being no privity between Lord Byron and the persons who had the mills. There is no difference between destruction and trespass where there is no privity of estate; and at law the writ of *estrepement* may be had to prevent repetition of waste. I have therefore ventured to grant an injunction in trespass; and this defendant will find it very difficult to maintain, that he can use his legal character of trespasser, in order to enable himself to commit what is absolute destruction.

The order for the injunction was made.

THOMAS *v.* OAKLEY.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1811.

[18 *Vesey* 184.]

The case, stated by the bill, was, that the plaintiff was seised in fee-simple of an estate, in which there was a stone quarry; and the defendant, having a contiguous estate, with a right to enter the plaintiff's quarry and take stone for building and other purposes, confined to a part of his

estate called Newton Farm, had taken stone to a considerable amount for the purpose of using it upon the other parts of his estate; praying an injunction and account.

To this bill the defendant demurred.

Mr. Hart and Mr. Horne, in support of the demurrer, relied on the distinction between waste and trespass; this being a mere trespass; and the account too trifling to change the jurisdiction.

Mr. Benyon for the plaintiff.

The course of modern authority is to afford assistance in these cases, of coal mines, timber, etc., to prevent irremediable mischief: an injury which damages could not compensate. In Mitchell *v.* Dors, 6 Vesey, 147, and many other cases, your Lordship, following Lord THURLOW, gave relief; giving the injunction, where an action of trespass might be maintained; and the account follows the injunction; to prevent multiplicity of suits.

The Lord Chancellor. The case has this specialty: the bill admits the defendant's right of entry into this quarry, and of taking stones for all the purposes of Newton Farm; though, if he takes for any other purpose, undoubtedly an action would lie: but is there any distinction between this case and that of a coal mine? Is not this taking away the very substance of the estate just as much as in the case of a coal mine? After the decisions that have taken place, this demurrer cannot be maintained. The plaintiff represents himself to be seised as tenant in fee of an estate, in which there is a stone quarry, that is parcel of the estate. He then states, which upon this occasion I must take to be true, that the defendant, having an estate in his neighborhood, consisting of Newton Farm, among other lands, as owner of that farm has a right to enter into the quarry for the purpose of taking stone, as far as he has occasion for building and other purposes upon that farm: but the plaintiff represents, that the defendant has taken stone, for the purpose of application, not upon Newton Farm only, but also upon his other estates, and to a very considerable amount. That is trespass beyond all doubt, and not waste; as there is no such privity between the parties as would make it waste. His entry for the purpose of taking stone with reference to Newton Farm is lawful: but, if under color of that right he takes stone for the enjoyment, not of his farm only, but his other estates, his entry to that extent is unlawful, and his act a trespass; and, if it is settled, that the court will interfere by way of injunction and account, this demurrer cannot prevail.

The distinction, long ago established, was, that, if a person, still living, committed a trespass by cutting timber, or taking lead ore, or coal, this court would not interfere; but gave the discovery; and then an action might be brought for the value discovered: but, the trespass dying with the person, if he died, the court said, this being property, there must be an account of the value; though the law gave no remedy. In that instance therefore the account was given, where an injunction was not

wanted. Throughout Lord HARDWICKE's time and down to that of Lord THURLOW, the distinction between waste and trespass was acknowledged: and I have frequently alluded to the case, upon which Lord THURLOW first hesitated: a person, having a close demised to him, began to get coal there; but continued to work under the contiguous close, belonging to another person; and it was held that the former, as waste would be restrained: but as to the close, which was not demised to him, it was a mere trespass; and the court did not interfere: but I take it, that Lord THURLOW changed his opinion upon that; holding, that, if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief, to which in equity he was entitled. The interference of the court is to prevent your removing that, which is his estate. Upon that principle Lord THURLOW granted the injunction as to both. That has since been repeatedly followed; and whether it was trespass under the color of another's right actually existing, or not.

If this protection would be granted in the case of timber, coals, or lead-ore, why is it not equally to be applied to a quarry? The comparative value cannot be considered. The present established course is to sustain a bill for the purpose of injunction, connecting it with the account in both cases; and not to put the plaintiff to come here for an injunction, and to go to law for damages.

The demurrer was overruled.

SHUBRICK *v.* YUERARD.

IN THE COURT OF CHANCERY OF SOUTH CAROLINA, 1808.[1]

[2 *Desaussure* 616.]

The bill in this case was filed by the complainant, who claimed a certain tract of land, to obtain an injunction against the defendant to restrain him from cutting timber, and committing waste on such land, then in the possession of the defendant, who claimed the same by adverse title, and was in the cultivation of part thereof.

Chancellor RUTLEDGE granted the injunction in this case, restraining the defendant from cutting timber or committing other waste till the trial and determination at law of the rights of the parties. No note has been preserved of the grounds of his decision. The defendant afterwards filed a demurrer, but it was never argued, the parties having compromised.

[1] This case is reported with cases decided in 1808, but the reporter states that "it was decided at a somewhat earlier period." In a learned and extended note to this case, the Reporter enumerates and analyzes the cases as well as others previously presented in this section.

STEVENS *v.* BEEKMAN AND OTHERS.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1814.

[1 *Johnson's Chancery* 318.]

Motion for an injunction on a bill, stating that the plaintiff, on the 20th of March, 1806, purchased by deed, in fee, for a valuable consideration, of Jacob Glen, certain lands therein described, in the county of Saratoga, and adjoining Glens Falls. That before the purchase, the plaintiff, for twenty years and upwards, had been in the quiet possession of the greater part of the premises, as tenant to Glen, and of the residue, for about three or four years. That Glen had good right and title to sell. That the plaintiff had continued, and still was in possession, as owner. That about three or four years ago, the defendant (Beekman) brought an action of ejectment against the plaintiff, for the south or west part of the premises, and which suit had never been brought to trial. That Beekman had no title. That the other two defendants, I. and G. Lumnendall, deriving or pretending to derive, a title under Beekman, had entered on the premises, and cut down timber, and taken it away, without permission; and that the part of the premises on which such waste was committed was principally, if not exclusively, valuable on account of the timber. That the two other defendants were still continuing to commit waste on the premises, and the plaintiff was apprehensive that the defendants would continue to do so, unless restrained by this court. The plaintiff, therefore, prayed for an injunction against a repetition of the trespass, and that the defendants may account for the timber already cut.

The bill was sworn to, and with an accompanying affidavit, that the two last defendants were poor.

The Chancellor [KENT.] This is a case of an ordinary trespass upon land, and cutting down the timber. The plaintiff is in possession, and has adequate and complete remedy at law. This is not a case of the usual application of jurisdiction by injunction; and if the precedent were once set, it would lead to a revolution in practice, for trespasses of this kind are daily and hourly occurring.

I doubt, exceedingly, whether this extension of the ordinary jurisdiction of the court would be productive of public convenience. Such cases are generally of local cognizance; and drawing them into this court would be very expensive, and otherwise inconvenient. Lord ELDON said, that there was no instance of an injunction in trespass, until a case before Lord THURLOW, relative to a mine, and which was a case approaching very nearly to waste, and where there was no dispute about the right. Lord THURLOW had great difficulty as to injunctions for trespass; and though Lord ELDON thought it surprising that the jurisdiction by injunc-

tion was taken so freely in waste, and not in trespass, yet he proceeded with the utmost caution and diffidence, and only allowed the writ in solitary cases, of a special nature, and where irreparable damage might be the consequence, if the act continued. It has also been allowed in cases where the trespass had grown into a nuisance, or where the principle of multiplicity of suits among numerous claimants was applicable. There is the less necessity for the interference of this court, since the statute makes the cutting down timber a misdemeanor punishable by fine and imprisonment, and also gives the party injured treble damages. There is nothing in this case so special and peculiar as to call for this particular relief, and especially when I am not justified by any established practice and precedent.

Motion denied.

LIVINGSTON *v.* LIVINGSTON.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1822.

[6 *Johnson's Chancery* 497.]

The bill stated, that the plaintiff was seised and possessed, by himself and his tenants, of a tract of land in the manor of Livingston, being part of great lot No. 4, in the town of Livingston, and lying to the north and west of Ruleff Janse's Kill. That he derived title by the will of his father; which he set forth, and the title, as far back as 1728. That the defendant has, in his own right, and in right of his wife, a number of tenants, in the town of Clermont; and they, by authority derived from or under him, had, shortly before filing the bill, entered upon the land of the plaintiff, and cut wood and timber; and the defendant declared, and directed his tenants to declare, that he and they had right so to do, for the use of their houses and upon their farms in Clermont. That the plaintiff's father and grandfather always held and enjoyed the said manor as an absolute and unencumbered estate, in fee, saving only the rights of their own tenants, holding under them; and no right to cut wood there, by any person residing in Clermont had been assented to or exercised. That in 1812, Elias Hicks, who resided in Clermont, as tenant of R. R. Livingston, father of the wife of the defendant, and under whom the defendant claims, cut wood on lot No. 4, and in that part now possessed by the plaintiff, and the father of the plaintiff sued him in trespass; that Hicks undertook, by plea, to justify, as tenant of R. R. L., who claimed, for himself, and his tenants of Clermont, a right to cut and carry away wood from the manor of L., necessary for their families and farms in Clermont; and the agent of R. R. L. defended the suit. That the cause was tried at the Columbia

circuit, in August, 1815; and, after the defendant had given his proof, the Chief Justice ruled, that the plaintiff was entitled to recover; but a verdict was taken for the plaintiff, at his request, subject to the opinion of the Supreme Court, upon a case to be made, and the damages were assessed at 100 dollars for the wood and timber cut. A similar verdict was taken, also, in another similar case, against Marks Platner. That the case against Platner was argued and decided in the Supreme Court, in favor of the then plaintiff, (a tenant of the father of the plaintiff,) and the defendant, and all claiming under him, have desisted, since, from trespasses on the wood, etc., until the death of the father of the plaintiff, in November last. That the plaintiff has given directions to have the case brought to argument in the suit against Hicks; but the trespasses, in the meantime, will greatly injure the value of the plaintiff's estate. Prayer for an injunction to restrain the defendant and his tenants from cutting timber, etc.

The Chancellor [KENT]. This is not the case of a stranger entering upon the land, as a trespasser, without pretence of right, and cutting down timber. In such a case, Lord THURLOW, in Mogg *v.* Mogg, Dickens, Rep. 670, refused to interfere by injunction. This is analogous to a case before Lord CAMDEN, referred to by the counsel in Mogg *v.* Mogg, and which Lord THURLOW seemed to approve of. It was, where a defendant claimed a right to estovers, and, under that right, cut down timber. There was a claim of right, and, until it was determined, it was proper to stay the party from doing an act, which, if it turned out he had no right to do, would be irreparable. So, also, in Hanson *v.* Gardiner, 7 Vesey 305, the injunction was granted, where the defendant claimed common of pasture and estovers; and, in that case, Lord ELDON observed, that the law, as to injunctions, had changed very much, and they had been granted much more liberally than formerly. They were granted in trespass, when the mischief would be irreparable, and to prevent a multiplicity of suits.

In Mitchell *v.* Dors, 6 Ves. 147, the defendant, in the process of taking coal, had begun to work into the land of the plaintiff, and though this was strictly a trespass, yet the injunction was granted, because irreparable mischief would be the consequence if the defendant went on. In Hamilton *v.* Worsefold, and in Courthope *v.* Mapplesden, 10 Vesey 290, and note, ibid., injunctions were granted against a trespasser entering with permission, or by collusion with the tenant and cutting timber.

Lord ELDON repeatedly suggested the propriety of extending the injunction to trespasses, as well as waste, and on the ground of preventing irreparable mischief, and the destruction of the substance of the inheritance. The distinction on this point, between waste and trespass, which was carefully kept up during the time of Lord HARDWICKE, was shaken by Lord THURLOW, in Flamang's case, respecting a mine, and seems to be almost broken down and disregarded by Lord ELDON. This protection is now granted in the case of timber, coals, lead ore, quarries,

etc.; and "the present established course," as he observed in Thomas *v.* Oakley, 18 Ves. 184, "was to sustain the bill for the purpose of injunction, connecting it with the account, in both cases, and not to put the plaintiff to come here for an injunction, and to go to law for damages."

The injunction was granted in Crockford *v.* Alexander, 15 Ves. 138, against cutting timber, when the defendant had got possession under articles for a purchase; and in Tworl *v.* Tworl, 16 Ves. 128, against cutting timber between tenants in common; and in Kender *v.* Jones, 17 Ves. 110, where the title to boundary was disputed; and in the case of Earl Cowper *v.* Baker, 17 Ves. 128, against taking stones of a peculiar and valuable quality at the bottom of the sea, within the limits of a manor, and in Gray *v.* Duke of Northumberland, 17 Ves. 281, against digging coal upon the estate of the plaintiff; and in Thomas *v.* Oakley, against exceeding a limited right to enter and take stone from a quarry. In all these cases, the injury was considered a trespass, and in two of them it was strictly so; and the principle of the jurisdiction was to preserve the estate from destruction. But I can safely allow the injunction in the present case, without going to the extent of these latter cases, or following the habit, as Lord ELDON termed it, in Field *v.* Beaumont, 1 Swanston 208, of the English Chancery, in granting injunctions in cases of trespass as well as of waste. Here has been one action of law, in which the claim of the defendant to estovers in the lands of the plaintiff has received a decision against him, and there is another suit at law still depending, in which the same question arises. It is just and necessary to prevent multiplicity of suits, that the further disturbance of the freehold should be prevented, until the right is settled; and the case decided by Lord CAMDEN is a sufficient authority for the interposition asked for in this case.

The recent decision by the Vice-Chancellor, in Garstin *v.* Asplin, 1 Madd. Ch. Rep. 150, shows, that it is not the general rule, that an injunction will lie in a naked case of trespass, where there is no privity of title, and where there is a legal remedy for the intrusion. There must be something particular in the case, so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy.

Injunction granted.[1]

[1] In N. Y. Printing & Dyeing Establishment, 1828, 1 Paige, 97, Chancellor WALWORTH said:

"The case of Livingston *v.* Livingston, and the several cases there referred to, settle the principle that an injunction will lie to restrain trespasses, even where there is a legal remedy for the intrusion; but there must be something particular in the case, to sustain the jurisdiction of the court so as to bring the injury under the head of quieting the possession, or to make out a case of irreparable mischief; or the value of the inheritance must be put in jeopardy by the continuance of the trespass."

JEROME *v.* ROSS.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1823.

[7 *Johnson's Chancery* 315.]

The Chancellor [KENT]. This is the case of an appeal from interlocutory decree.

The order, continuing the injunction, overruled the two grounds, taken in support of the motion for dissolving the injunction, and which were,

1. The want of equity in the bill.

2. The sufficiency of the justification set up in the answer.

1. I have not been able to satisfy myself that the bill contains sufficient equity to warrant the injunction.[1]

The bill contains a charge of trespass, by entering upon the land of the plaintiff, and digging, throwing up, and carrying away, large parcels of stone, from a ledge of stone and mass of rock on the premises. Several actions have been commenced in a court of record to recover damages for this trespass; but it is not stated that any of these actions have been brought to trial. One action has likewise been instituted before a justice of the peace, and that action has been tried, and the plain-

[1] Only the opinion of the learned Chancellor is given on the first point. The injunction was dissolved.

This was Chancellor KENT'S last case. Two days later, July 31, 1823, the Chancellor having completed his sixtieth year, left the bench in accordance with a provision of a foolish law limiting the tenure of judicial office to the sixtieth year. Considering the delay of English Chancery, the Reporter's note will have a double and peculiar interest: "This day the Chancellor terminated his judicial labours, having heard and decided every case and motion brought before him."

It is not too much to say that these various cases before Chancellor KENT, based as they were upon enlightened English precedent, established the law upon a firm, intelligent and intelligible basis before the masterly decision of Vice-Chancellor KINDERSLEY in Lowndes *v.* Bettle.

In Wood *v.* Braxton, 1892, 54 Fed. 1005, 1008, GOFF, Circuit Judge, truly and impressively said:

"The judisdiction of courts of equity by way of injunction to restrain waste, to prevent the cutting of timber, and the mining of minerals, is one of comparatively recent origin, but it is now fully recognized and well established in this country as well as in England. A leading case, in which the question of equity jurisdiction in such controversies was fully considered and previous authorities discussed, is that of Jerome *v.* Ross, 7 Johns. Ch. 315. This is the last decree rendered by that illustrious Chancellor, whose able, clear, and erudite opinions not only charm, but instruct and convince us—KENT—and it is replete with the wisdom of the English and American decisions on that ques-

tiff recovered damages to the amount of 25 dollars. The plaintiff has his complete and perfect remedy at law for the trespass, as often as it may be repeated; and the only question is, whether the injury be so ruinous and irreparable as to call for the extraordinary interposition of a court of equity. The bill does not pretend that the ledge of rock, upon which the trespass was committed, was of any particular use or value to the plaintiff, or that he ever did or ever intended to apply it to any valuable purpose. The plaintiff speaks of the injury as irreparable, because the loads of stone, taken from the mass of rock, cannot be replaced or restored; but as he does not state that the rock was of any use to him, as proper or fit for building, fencing, etc., or that it was even desirable as an object of ornament or taste, there was no need of having the same identical fragments of stone replaced, and the injury was not, in the sense of the law, irreparable. It was susceptible of a perfect pecuniary compensation. The case, therefore, seems to resolve itself into this single point, whether a court of equity ought to interpose, by injunction, to restrain a trespass, when the injury does not appear to be irremediable and destructive to the estate, and when the ordinary legal remedy in the courts of law can afford adequate satisfaction.

The English Court of Chancery is now in the habit of granting injunctions in trespass, when the case is peculiar and special; and even this practice came into use long subsequent to the date of our revolution. As late as 1786, Mogg *v.* Mogg, Dickens, 670, Lord THURLOW directed a search to be made, to see if ever there was an instance of an injunction,

tion. See also Anderson *v.* Harvey, 10 Grat. 386; McMillan *v.* Ferrell, 7 W. Va. 223; Moore *v.* Ferrell, 1 Ga. 7; Erhardt *v.* Boaro, 113 U. S. 537, 5 Sup. Ct. Rep. 565.

"If the nature of the inquiry complained of goes to the substance of the estate, thereby producing irreparable mischief, equity will interfere in limine, and not require the party to resort to an action at law, and this independent of the question of the insolvency of the defendant. The chief value of the land in the bill mentioned is charged to be in its timber, and this the defendants, it is conceded, have made extensive arrangements to remove, having expended many thousands of dollars for that purpose. This removal goes to the very substance of the inheritance, to the destruction of that which is the main element of value to it. The fact that the value of timber can be estimated, that it can be determined by the thousand feet, or by the car load, does not deprive a court of equity of the right to interfere by way of injunction, in cases where it is being cut and removed or destroyed, and where the ownership is in controversy. The products of mines and forests have a value that can generally be fixed, yet it was in prevention of trespasses to property of that character that the jurisdiction in question had its origin, and is now most frequently exercised. While it is true that, when this jurisdiction for equity was first claimed, 'Lord THURLOW hesitated' and 'Lord ELDON doubted,' it is now well determined—the decisions coming from courts of such character as to command our respect and of such grade as to compel our approval—that the jurisdiction not only exists, but that it is absolutely essential for the preservation of right and the suppression of wrong."

where a mere trespasser entered upon land and cut timber; and as no such precedent could be found, he denied it even in a case of trespass in cutting down timber. But since that time, the practice has been introduced and justly and reasonably applied to special cases, where irreparable ruin would have followed the refusal to enjoin the trespass. It was allowed by Lord THURLOW, in Fleming's case, cited 6 Vesey, 147, where the defendant had worked from his own land into the coal mine of the plaintiff; and that case was followed by Lord ELDON, 6 Vesey, 147; 7 Ves. 307, on the principle that irreparable mischief and ruin of the property, as a mine, would be the consequence, if the party was not stopped. On the same ground, the injunction is granted against diverting a water-course from a mill, 1 Bro. 588; against the destruction of timber, 10 Vesey, 290; against the taking of stones of a peculiar value, 17 Vesey, 128; or stones from a quarry, 18 Vesey, 184. But all these are cases of great and irremediable mischief, which damages could not compensate, because the mischief reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed. The present case is, in no reasonable sense, analogous to those cases. The plaintiff does not aver, or show, that the "ledge of stone and mass of rock," on which the trespass is committed, is of any essential use, or that he does or can apply it to any valuable purpose. It is very possible that this "ledge of rock" may be some precipitous, naked, barren hill, absolutely worthless for any other purpose than that to which the defendants apply it. Is the case, then, to be compared to that of a lead or coal mine, or a quarry of marble, or a fine building, or precious stone, or a grove of timber, or a mill establishment, which the Court of Chancery has thought proper to protect from trespass and ruin, by the strong and menacing hand of an injunction? Certainly not; and if the plaintiff is entitled to an injunction in this case, I do not see why every man, in possession of land, may not call for an injunction to protect him from his neighbor's trespasses in every possible case.

The objection to the injunction, in cases of private trespass, except under very special circumstances is, that it would be productive of public inconvenience, by drawing cases of ordinary trespass within the cognizance of equity, and by calling forth, upon all occasions, its power to punish by attachment, fine and imprisonment, for a further commission of trespass, instead of the more gentle common law remedy by action, and the assessment of damages by a jury. In ordinary cases, this latter remedy has been found amply sufficient for the protection of property; and I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass, which go to the destruction of the inheritance, or where the mischief is remediless. This was the opinion and doctrine which I had occasion to declare in the case of Stevens *v.* Beekman, 1 Johns. Ch. Rep. 318, and it ap-

pears to be the English doctrine, and the practice of this court has been in conformity to it. I do not know a case in which an injunction has been granted to restrain a trespasser, merely because he was a trespasser, without showing that the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass. In ordinary cases, the damages to be assessed by a jury will be adequate for a check and for a recompense. Every man is undoubtedly entitled to be protected in the possession and enjoyment of his property, though it may be of no intrinsic value. He may have on his land a large mound of useless stone or sand, which he may not deem worth the expense of inclosing, and yet it would be a trespass for any person to remove any portion of the stone or sand without his consent; and he would be entitled to his action, even though the damages were nominal. But would it be proper for this Court to assume cognizance of such a trespass, and lay the interdict of an injunction upon it? I apprehend not.

The bill, to which I am still confining myself, does not, except in a very imperfect manner, disclose the pretences or claim of right under which the trespass has been committed. It only states, that the defendants are engaged in building a dam in Hudson's river, near the north line of the city of Troy, and that the materials taken from the ledge of rock are applied to the dam; that one of the defendants acts as engineer in that operation, and that the defendants pretend that they are acting in behalf of this state, and by authority of the statutes relative to canals. But admitting that the defendants do pretend to act by public authority in their commission of the trespass, it does not alter the principle; and the trespass itself must be of the character I have described, before a court of equity can be called upon to interfere by injunction. All the cases referred to, were those in which the trespass went to the destruction of the property, as it had been held and enjoyed. In the case of Agar *v.* The Regent's Canal Company, Cooper's Eq. Rep. 77, the defendants were empowered by a private act of parliament to cut a canal; the line of the canal had been prescribed, and they departed from that line, and were carrying the canal through a garden and rickyard; and Lord ELDON allowed an injunction. So, in the case of Shand *v.* Henderson, 2 Dow, 519, the Aberdeen Canal Navigation Company were charged with having taken and appropriated lands to their use, by unwarrantably deviating from the line particularly prescribed by statute, and an injunction to restrain the Canal Company within their limits was admitted to be proper. But in both these cases, the companies were making a permanent appropriation of the land, and destroying the inheritance; and upon the acknowledged principle, in all the cases, it was necessary to restrain them. In the case, also, of Hughes *v.* The Trustees of Merton College, 1 Vesey, 188 and Belt's Supp., the commissioners of a turnpike company entered, took possession of, and were destroying, by digging for gravel, large garden grounds of the

plaintiff, who was a gardener by trade. The turnpike act had specially excepted gardens, as well as orchards, planted walks, etc.; and Lord HARDWICKE thought it a clear case of trespass, and of such a nature that the plaintiff was entitled to seek his remedy by injunction, though he had his remedy at law. But he admitted, that if there had been any ground for doubt, whether or not the commissioners had authority, he would not have interposed until the doubt had been removed, and the matter finally determined at law. And it is to be observed, that here was the destruction of what a man was using as his trade or livelihood.

Several cases have occurred in this court, in which public trustees have been restrained by injunction from acts of trespass; but the acts were such as went to destroy the enjoyment of valuable property and privileges.

Thus, in the case of Gardner *v.* The Trustees of Newburgh, 2 Johns. Ch. Rep. 162, the trustees were going to divert a stream of water that had flowed immemorially, and had supplied the brickyard, the distillery, and mill erections of the plaintiff; and the case not being deemed within the provisions of the act in favor of those trustees, an injunction was granted. Afterwards, in Belknap *v.* Belknap, 2 Johns Ch. Rep. 463, an injunction was allowed upon the same principle, of preventing a great and irreparable mischief. In that case, inspectors under an act of the legislature for draining certain swamps and bog meadows, for the benefit of some individuals, undertook to lower a large pond of 400 acres, by cutting down the outlet which would destroy the value of the pond and outlet as a source of water for the use of mills established on the outlet. It was considered to be an interference not warranted by the statute, and to be a great and special trespass, leading to lasting mischief, and the destruction of the estate. It was further observed, that it was not a case which concerned the public, but one of mere private convenience and profit, and the act ought to be strictly construed.

These cases all show, that, in respect to acts of trespass committed upon land, even by persons in a public trust, under color of law, the Court has not interfered by injunction, unless where the trespass was permanent, as well as grievous, or went to destroy the value of the property to the owner. It is not sufficient that the act be simply, *per se,* a trespass; but it must be a case of mischief and of irreparable ruin to the property, in the character in which it has been enjoyed. In all other cases, the common law remedy is deemed to be adequate, and perfectly competent to give compensation, as well as to deter and prevent the repetition of the trespass, by the exemplary damages which it will inflict.

A court of equity will sometimes interfere to prevent a multiplicity of suits, by a bill of peace. The principle is stated in Lord Tenham *v.* Herbert, 2 Atk. 483, and in Eldridge *v.* Hill & Murray, 2 Johns. Ch.

Rep. 281. But that is only in cases where the right is controverted by numerous persons, each standing on his own pretensions; and it has no application to the case of one or more persons choosing to persevere in acts of trespass, in despite of suits and recoveries against them. A troublesome man may vex and harrass his neighbor, by throwing down his fences, and turning cattle upon his grounds, or by passing over them, or otherwise annoying him; but it is to be presumed, that repeated recoveries for damages, with the punishment of costs, and such smart money as a jury would naturally give, would soon effectually correct any such disposition. At any rate, I do not know that a court of equity has ever interfered merely to correct such a practice; and it would certainly require very strong evidence of the inefficacy of the ordinary legal remedies for compensation, as well as for correction, before this Court would venture to assume a jurisdiction hitherto unknown.

For these reasons, I am of opinion, that the bill itself does not contain matter sufficient to warrant or sustain the injunction; and that the plaintiff ought to have been left to his remedy at law.

LOWNDES *v.* BETTLE.

IN CHANCERY, BEFORE SIR R. T. KINDERSLEY, V. C., 1864.

[33 *Law Journal, Chancery,* 451.[1]]

A testator in 1768 devised his estate to his heir-at-law, but if no heir-at-law could be found, he declared that William Lowndes should be his heir. The testator died in 1772; and in 1773 William Lowndes filed a bill to have his rights so ascertained. No heir-at-law could be found, and in 1783 a decree was made establishing the will, and declaring that the estate was to be considered as belonging to William Lowndes, and that he was to be put in possession. The estate continued in his family ever since, and the plaintiff was one of his descendants, and the present owner. The defendant claimed to be heir-at-law of the testator, and in September, 1861, and since, had sent notices to the plaintiff threatening to come on the estate, and to cut trees and turf, in order, as he said, to keep up his rights, and to bar the Statute of Limitations.

On a motion for an interim injunction the defendant did not appear, and the injunction was granted; the case now came on to have the injunction made perpetual.

KINDERSLEY, V.C. (Jan. 23), after remarking on the threats of litiga-

[1]The case is even more elaborately reported in 10 Jurist. N. S. 226. A shorter, and in some respects, more satisfactory report of the case is to be found in 3 New Reports, 409. The above statement of the facts of the case is taken from this latter report.

tion, and the vulgarity of their terms, said: Of course, the defendant has a right to assert his claim, but he insists on his right to do so by perpetually doing some mischief to the property, evidently supposing that the continuity of his claim bars the operation of the statute of limitations: whether feigned or real, such appears to be his impression; but assuming it to be honest, it is a most absurd one. The defendant has not gone into any evidence, but has put in his answer, by which (in effect) he says, "There being an injunction, while that is pending, I do not mean to do any of the acts complained of." About the facts, which, at the hearing, there is evidence to prove, there is, indeed, no dispute.

It was contended, for the defendant, that assuming the truth of all those facts, the court could not, according to the law as administered by it, interfere to restrain such acts as had been threatened; and several cases were cited, although only some of the many which exist on the subject. I have thought it necessary to go through all that I have found (although I may have overlooked some) with great care, because they present a very unsatisfactory state of the law, and there is great difficulty in—I may even say an impossibility of—reconciling them. The difficulty arises (in part, no doubt) from the very considerable change which has taken place in the views of this court on the subject of granting injunctions to restrain injury to property, and from the fact that the court will now do what in the time of Lord THURLOW, and the earlier days of Lord ELDON, it would not have done. Lord ELDON, in the earlier part of his time, alluded to the change even then in progress, and to the facility in granting injunctions as being even then greater than in former times. The other judges subsequently advert to the continuous modifications, which in some degree also, and not unnaturally, accounts for the conflict of authorities that now exists. Another cause for such apparent conflict is, the not distinguishing the cases under certain heads. Now the proper mode of arranging them, I think, is this,—at least, it would be convenient thus to distinguish them. There should be two distinct classes of cases: the one where the party against whom the application for the injunction is made is in possession; and the other, where the plaintiff is in possession and is asking the court to protect the estate. *A priori*, it is obvious that the court will draw a clear distinction between the two classes of cases. If a man claims to be owner of an estate of which he either is in possession, or in a position tantamount to that, the court will be very slow to interfere to restrain such an apparent owner from doing those acts which an owner so situated may properly do. There is a wide difference between such a case and that of a person claiming to be owner (whatever the ground of his claim), not taking proceedings at law to recover, but coming on the owner's estate, and doing acts injurious to it. Therefore, it appears to me the cases are to be arranged under these two heads. I have endeavored to do that, but at the same time I am bound to say, that the great difficulty is to ascertain which party is in possession; notwithstanding that these are the two obvious heads (which I have men-

tioned), and having so divided them, the next thing is to discover the law of this court on the subject, so far as it can be extracted from the authorities. First, then, I may observe that, according to the older cases, a wider distinction was taken between what was then called waste and trespass. The term "waste" was used in the sense of spoliation, though with a technical and personal application. It was considered waste when the plaintiff and defendant had a privity of title, such as that of tenant for life and remainderman. If the tenant for life committed waste the remainderman could ask for an injunction. So in the case of landlord and tenant; then there was a privity, and the tenant in possession doing acts amounting to waste the landlord could have got an injunction. It was by reason of the privity of title that the law called it waste. But when parties did not claim in that way, but by an adverse title, any act done by the one or by the other of them was then called "trespass." That act might have been one of destruction or spoliation. That broad distinction runs through all those cases.

I am not now going to consider the cases of waste, but only those of trespass, as distinguished from waste, which, in strictness, ought to be called spoliation, and not waste. Referring then only to cases of trespass, those ought to be ranged again under two heads, viz., the one where the defendant is in possession and the plaintiff seeks the injunction, and the other where the plaintiff is in possession and asks to restrain some acts done by the defendant who claims adversely.

With respect to the cases where the defendant is in possession, of course, one can hardly conceive a plaintiff asking for an injunction unless on an adverse claim, each claiming to be the real owner of the estate. The earliest case under this head was that of Hamilton *v.* Worsefold, before Lord THURLOW, which is to be found in a note of Sir SAMUEL ROMILLY'S, 10 Ves. 290. That was a case in which it could hardly be considered that either party was actually in possession: perhaps the defendant was; but the plaintiffs had never received rent, and Lord THURLOW, after some hesitation, granted an injunction, restraining not only the defendant but the tenants from committing waste. Not much reliance can be placed on that case, because there may have been collusion between the defendant and the tenants, and it may be that the defendant was not in possession. Lord THURLOW at first considered it as trespass, but ultimately did restrain the defendant and the tenants, Reg. Book (A) 1786, fol. 1.

The next case was Pillsworth *v.* Hopton, in 1801. There, the defendant being in possession, the plaintiff claimed under an adverse title, and Lord ELDON refused the injunction.

The next case was Crockford *v.* Alexander, 15 Ves. 138, in 1808, a case of vendor and purchaser, a peculiar case, and hardly in point. The plaintiff there had contracted to sell an estate to the defendant, who obtained possession, and began to cut timber. It is difficult, therefore, to say there might have been privity there. Lord ELDON says: "Although at

law the defendant is a trespasser, he is in equity, by the effect of the contract, the owner of this estate, having taken possession under the contract, and the vendor is in the situation of an equitable mortgagee. This court has occasionally granted an injunction in cases of trespass as well as waste; and having thought much upon this subject, I will grant the protection against cutting timber, until the power of the court to grant the injunction against trespass shall be fully discussed. Lord THURLOW refused the injunction in this case: a man, possessed of two fields, demised one with the mines under it; the lessee found his way, working under ground, to the mines under the other field which was not demised. Lord THURLOW held that to be trespass, not waste, and did not grant the injunction. In Lord Byron's case it was destruction, not waste; there being no privity between Lord Byron and the persons who had the mill." [I shall come to speak of Lord Byron's case by and by; Lord ELDON goes on:]—"There is no difference between destruction and trespass where there is no privity of estate, and at law the writ of *estrepement* may be had to prevent repetition of waste." The report adds, that the order for the injunction was made. It is somewhat curious that Lord ELDON in other cases refers to that before Lord THURLOW, which he mentioned in Crockford *v.* Alexander, but does so as if he sometimes thought Lord THURLOW had granted the injunction, at other times that he had refused it. Perhaps he did refuse it at first, but afterwards granted it.

Jones *v.* Jones, 3 Mer. 161, was before Sir WILLIAM GRANT. In that case a demurrer was filed by the defendant to a bill by an heir-at-law, seeking discovery and relief, including an injunction to stay waste and destruction pending litigation. Sir WILLIAM GRANT allowed the demurrer. In that case it was held that an heir-at-law out of possession could not have an injunction against a devisee in possession. Sir WILLIAM GRANT says, p. 173, "In Smith *v.* Collyer, an injunction was refused when applied for by the devisee against the heir. I own I cannot see a very good reason why the court, which interferes for the protection of personal property pending a suit in the Ecclesiastical Court, should not interpose to preserve real property pending a suit concerning the validity of the devise."

The next case is that of Haigh *v.* Jaggar, 2 Collyer, 231. There, there was a house and land with coal under it. It did not appear that the plaintiffs were working, but the defendants were working out of their own mines into those of the plaintiffs. The latter parties brought two actions, and the Vice-Chancellor (KNIGHT BRUCE) refused the injunction, expressing dissatisfaction with the strange state of the law.

The next case was Talbot *v.* Hope Scott. The court there stated in effect how much more reluctant it is to entertain a suit against a person in possession than where he is not. The question, "What is possession?" is evidently of great importance, and ought, I think, to be made the foundation of the distribution of the cases. In Neale *v.* Cripps an injunction to restrain stripping timber off an estate was granted, on the

ground that the acts done by the defendant in possession tended to destruction. There were two other cases, before Sir ANTHONY HART, in Ireland, Lord Fingal *v.* Blake, 2 Molloy 542, and Lloyd *v.* Lord Trimleston, Ibid. 81, where he acted upon the same principles. Those are all the cases in which the plaintiff was out of possession, and the result of them is, that the court will refuse to interfere except where there is fraud or collusion, or where the acts perpetrated or threatened are so injurious as to tend to the destruction of the estate.

I now come to the cases which resemble the present one, where the plaintiff was in possession. Those again are to be divided under two subordinate heads: first, where the defendant claims under a color of right; and, secondly, where he is an absolute stranger. It is not easy to distinguish these cases; the latter may be cases of mere spite: still there are such. In Mogg *v.* Mogg, 2 Dickens 670, the injunction was refused on the ground that the defendant was a mere trespasser, and an action would lie. In Mortimer *v.* Cottrell, 2 Cox 205, the injunction to stay waste was refused, because it was a case of trespass and the defendant might at law have been turned out immediately. Mitchell *v.* Dors, 6 Ves. 147, was a case of coal mines in work; there it was held to be trespass and not waste, and yet an injunction was granted, because being coal mines the mischief was considered irreparable.

I must confess I cannot see why the mischief done in the case of coals is more irreparable than in that of trees, for in both cases the injury, whether great or small, may be made the subject of money compensation. Courthope *v.* Mapplesden, 10 Ibid. 90, was a case relating to timber, where the injunction was granted, the fact being that a stranger was colluding with the tenants. In Earl Cowper *v.* Baker, 17 Ibid. 128, a party was restrained from taking argillaceous stones under the sea. That case was also one of a stranger. In it the mischief was considered to be irreparable. The plaintiff was the lord of the manor, and his rights extended out beyond low-water mark, as far as a certain small barrel, which could be seen from the shore. Lumps of clay had formed within the limit, and had become an article of great value for particular manufactures. Great profit was derived from the sale of the article, and Lord ELDON considered the damage then done to the plaintiff to be irreparable; not because it was a destruction *simpliciter,* but because it was a taking away of the substance of the inheritance. Great stress was laid in that case on the character of the mischief, and therefore it was that relief was given in equity, although money would have been a remuneration.

I now come to the cases which more immediately resemble the present one. In this case Mr. Lowndes and his ancestors have been in possession of the property for eighty years, and the defendant claims a title, not as a mere stranger, but saying that he is the heir to the property, and that the statute is no bar, because he has removed it by having come, and by claiming to come upon the estate, and by having cut down trees as he pleased in order to assert his right. With respect to cases of this kind,

I may observe that an injunction was granted in all cases but one; but there were elements in some of the cases which are not to be found here.

Those cases are six in number: one was before Lord CAMDEN, not reported originally, but cited in Mogg *v.* Mogg. No name is there given to it; but it was a case where persons were cutting timber under color of a right to estovers. The plaintiff, who was the lord of the manor, probably alleged the cutting to be beyond what was wanted for estovers; at all events, the injunction seems to have been granted. Lord THURLOW, however, said that the case did not apply to Mogg *v.* Mogg; for in that case (as referred to by the plaintiff's counsel in Mogg *v.* Mogg), there appeared to be a right to something in the defendants, though perhaps they carried it beyond what such right went to; and that until such right was determined, it was very proper to stay them from doing an act which, if it turned out that they had no right to do, would be irreparable. But in Mogg *v.* Mogg the defendant had no interest; he was a mere trespasser. As such, an action of trespass would lie against him; and therefore Lord THURLOW would not grant the motion. It was not, as I take it, because the mischief might not have been capable of compensation, but because it was a destruction of part of the inheritance. In the case of Robinson *v.* Lord Byron, 1 Bro. C. C. 588, the plaintiff was in possession of his own water mill. The defendant was the owner of the stream above the mill, and in order to vex the plaintiff, sometimes kept back water from the mill, and sometimes deluged it with water. In that case it was difficult to say which was in possession; but Lord Byron was restrained from so using the stream as to do mischief to the plaintiff's mill. In Smith *v.* Collyer the injunction was refused by Lord ELDON, because it was a case of trespass. There infants were in possession by their guardian, and the defendant claimed as heir. Lord Justice KNIGHT BRUCE, in Haigh *v.* Jaggar, hesitated to say that Lord ELDON was wrong in Smith *v.* Collyer. He was not satisfied that in the same circumstances the court would not now grant an injunction; and he referred to the change which had taken place in the law on the subject. Grey *v.* The Duke of Northumberland, 13 Ves. 236, was a case of copyhold; and there an *ex parte* injunction was granted to restrain the opening of a mine. The defendant claimed as lord of the manor; and Lord ELDON on motion to dissolve the injunction, 17 Ibid. 281, said he would do so, unless some means of producing a speedy trial of the right at law could be insured. Kinder *v.* Jones was also a case of the lord of a manor, the subject-matter of the suit being trees. There Sir WILLIAM GRANT, sitting for the Lord Chancellor, granted the injunction. The last case on this head is Thomas *v.* Oakley, 18 Ibid. 184. The defendant there having the right, as an easement, of taking stone from the plaintiff's quarry for building and other purposes on a certain part of his own estate, took stone for the like purposes on other parts of his estate. The plaintiff filed his bill for an injunction and an account. The defendant demurred, and the demurrer was overruled on the ground that the defendant was subtracting from the inheritance. In

all these cases (except Smith *v.* Collyer), where the plaintiff was in possession and the motion was made for an injunction to restrain the defendant, who claimed under an adverse title, the injunction was granted. Many other cases might be referred to containing dicta which tend to show the continually increasing feeling and opinion among the learned judges, of the impropriety of preserving the distinction between trespass and waste, and the injustice of refusing to interfere in all cases of trespass.

But I have now to consider what the court is to do in this case, where the plaintiff is in possession, as it seems lawfully, and is asking for an injunction to restrain the defendant who is out of possession, but who claims a title (however incapable it may be of being supported) as heir-at-law to the property. He has also given notice that whenever it suits his convenience he will cut down trees, cut sods, etc., and he has reminded the plaintiff of twelve trees cut down by him or his family on a former occasion, which is as much as to say that he will do the same thing again. If a person desires to do a certain act for the purpose of asserting a right, or keeping alive a claim, this court will not restrain him from doing the act if it is necessary to his title, and for his benefit, but nothing can be more absurd than the notions, not to say the delusion of the defendant; he has only to refer to any lawyer, who would say to him, "How can you do any good by cutting down trees?" etc.; but his own opinion was, that although the plaintiff has an eighty years' title, he had a right to the property as heir. Then, again, even assuming that he is the heir, and means to show his title, he has not shown it. No doubt, under the old rule, his acts would have been tantamount to a trespass. He might, as it is, come on the land and do irremediable damage, incapable of being compensated by money. He might injure the most valuable and ornamental trees, the cost of which could not be compensated for by money. The question, then, would be, whether such acts were against his conscience? That would be the test. It appears to me that the case comes under the head of "irremediable waste," as defined by Lord ELDON, that is, a destruction of the substance of the inheritance; and I think it comes within the cases in which the plaintiff being in possession and the defendant not, an injunction has been granted. I think, therefore, that under the circumstances, and having regard to what appears to me to be the constant tendency of the decisions upon the subject, viz., to break down the unreasonable distinction between trespass and waste, that this is a case in which the injunction ought to be granted.

I have gone into this case at great length, because of the difficulty of finding the principle upon which to act; I should say, however, that it is this: where a defendant is in possession, and a plaintiff claiming possession seeks to restrain him from committing acts similar to those here complained of, the court will not interfere, unless, indeed (as in Neale *v.* Cripps), the acts amount to such flagrant instances of spoliation as to justify the court in departing from that general principle. Where the

plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under the color of right, then the tendency of the court is *not* to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law, though where the acts tend to the destruction of the estate, the court will grant it. But where the person in possession seeks to restrain one who claims by an adverse title, the tendency of the court will be to grant the injunction, at least when the acts done either do or may tend to the destruction of the estate. I am of opinion, therefore, that this injunction must be made perpetual.

ERHARDT *v.* BOARO AND OTHERS.

IN THE SUPREME COURT OF THE UNITED STATES, 1885.

[113 *United States* 537.]

The facts which make the case are stated in the opinion of the court.

Mr. Elihu Root for appellant.

Mr. T. M. Patterson and Mr. C. S. Thomas for appellees submitted on their brief.

Mr. Justice FIELD delivered the opinion of the court.

This is a suit in equity ancillary to the action for the possession of the mining claim just decided. It is brought to restrain the commission of waste by the defendants pending the action. The bill sets forth the discovery by one Thomas Carroll, a citizen of the United States, while searching on behalf of himself and the plaintiff, also a citizen, for valuable deposits of mineral on vacant unoccupied land of the United States, of the outcrop of a vein or lode of quartz and other rock bearing gold and silver in valuable and paying quantities, the posting by him in his name and that of the plaintiff, at the point of discovery, of a notice that they claimed 1,500 feet on the lode, the intrusion of the defendants upon the claim, their ousting the locators, and other facts which are detailed by the record in the case decided, and the commencement of the action at law. It also alleges that the defendants were working the claim, and had extracted from it one hundred and fifty tons, or thereabouts, of ore, containing gold and silver of the value of $25,000, and that about one hundred tons remain in their possession on the premises. The bill prays for a writ of injunction restraining the defendants from mining on the claim, or extracting ore therefrom, or removing any ore already extracted, until the final determination of the action at law. The principal facts stated in the bill are supported by affidavits of third parties. The court granted a preliminary injunction, but, after the trial of the action at law, judgment being rendered therein in favor of the defendants, it

dissolved the injunction and dismissed the bill. From the decree of the court the case is brought here by appeal.

It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. In Pillsworth *v.* Hopton, 6 Vesey, 51, which was before Lord ELDON in 1801, he is reported to have said that he remembered being told in early life from the bench "that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction." This doctrine has been greatly modified in modern times, and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title. Jerome *v.* Ross, 7 Johns. Ch. 315, 332; Le Roy *v.* Wright, 4 Sawyer, 530, 535.

As the judgment in the action at law in favor of the defendants has been reversed, and a new trial ordered, the reason which originally existed for the injunction continues.

The decree of the court below must, therefore, be reversed, and the cause remanded, with directions to restore the injunction until the final determination of that action; and it is so ordered.[1]

[1] In Griffith *v.* Hilliard, 1890, 64 Vt. 643, 645, START, J., after citing and following the principal case, said:

"When it appears that the title is in dispute, the court may, in its discretion, issue a temporary injunction and continue it in force for such time as may be necessary to enable the orator to establish his title in a court of law, and may make the injunction perpetual when the orator has thus established his title; or the court may proceed and determine which party has the better title; or it may dismiss the bill and leave the orator to his legal remedy. Bacon *v.* Jones, 4 Mylne & Craig 433; The Duke of Beaufort *v.* Morris, 6 Hare 340; Campbell *v.* Scott, 11 Simons 31; Kerr on Injunctions, 209; Ingraham *v.* Dunnell *et al.*, 5 Met. 118; Rooney *v.* Soule, 45 Vt. 303; Wing, Admr. *v.* Hall *et al.*, 44 Vt. 118; Lyon *v.* McLaughlin, 32 Vt. 423; Hastings, Admr., *v.* Perry *et al.*, 20 Vt. 278; Barnes *v.* Dow, 59 Vt. 530; Barry *v.* Harris, 49 Vt. 392."

The form of a decree so framed to do justice alike to plaintiff and defendant is that of Judge GOFF, in Wood *v.* Braxton, 1892, 54 Fed. R. 1005, 1010.

WILLIAMS *v.* THE NEW YORK CENTRAL RAILROAD CO.

IN THE COURT OF APPEALS OF NEW YORK, 1857.

[16 *New York* 97.]

SELDEN, J.[1] This is a suit in equity, the object of which is to obtain a perpetual injunction, restraining the defendants from continuing to use and occupy with their railway a portion of a certain highway or street in the village of Syracuse, known as Washington street, and to recover damages for its past occupation. Washington street was gratuitously dedicated to the use of the public by the plaintiff and others through whose land it was laid; and the Utica and Syracuse Railroad Company, to the rights and liabilities of which the defendants have succeeded, constructed their railway upon it without making any compensation to the plaintiff, and without his consent. At the time the track was laid the plaintiff was the owner of a large number of lots fronting upon the street, a portion of which he has since sold, with a reservation of his claim against the railroad company for damages, and a portion of which he still owns. The damages which have accrued, both upon the sold and unsold portions of the premises, are claimed in this suit.

It is conceded that, by the dedication, the public acquired no more than the ordinary easement or right to use the premises as a highway; and that the plaintiff continues the owner in fee, in respect to the unsold lots, to the center of the street, subject only to this easement.

I concur with the learned chief justice, and have no hesitation in coming to the conclusion that the dedication of land to the use of the public as a highway is not a dedication of it to the use of a railroad company; that the two cases are essentially different; and that, consequently, a railway cannot be built upon a highway without compensation to the owners of the fee.

It follows that the defendants, in constructing their road upon Washington street without the consent of the plaintiff, and without any appraisal of his damages or compensation to him in any form, were guilty of an unwarrantable intrusion and trespass upon his property, and that he is entitled to relief. Although he had a remedy at law for the trespass, yet, as the trespass was of a continuous nature, he had a right to come into a court of equity, and to invoke its restraining power to prevent a multiplicity of suits, and can of course recover his damages as incidental to this equitable relief. There may be doubt as to his right to recover in this suit the damages upon the lots which have been sold; because, as to those lots, there was no occasion to ask any equitable relief, and to permit the damages to be assessed in this suit, in effect deprives the defendants

[1] Only so much of the opinion is given as relates to the right to an injunction.

of the right to have them assessed by a jury. But as this question has not been raised, it is unnecessary to consider it.

The judgment must be reversed, and there must be a new trial, with costs to abide the event.

Judgment reversed and new trial ordered.

On the third trial of the case then called Henderson *v.* The New York Central R. R. Co. the referee ordered judgment in favor of the plaintiffs, successors in interest of the original party, for $19,508.79 damages, besides, costs, and further ordered that if the plaintiffs tender to the defendants a conveyance of their interest in the land in question, in said street, and a release of their damages, except said sum of $19,508.79, the defendants shall pay to the plaintiffs the further sum of $4,339.43 and interest from the date of the report; and in default of such payment, the defendants shall be perpetually enjoined from using such portions of said street, and if the plaintiffs fail to make such tender, the injunction is denied.

On this, the second appeal in the action now entitled Henderson *v.* N. Y. Central R. R. Co., 1879, 78 N. Y. 423, DANFORTH, J., delivered the opinion of the court as follows:[1]

"The relief sought is: First, damages. Second, an abatement of the use of the railroad, and a removal of the track. Third, an injunction against the running of trains, or if the defendants are permitted to use the track to do so only on condition that the plaintiff shall first be paid his damages. The amount of the depreciation is stated, and the allowance of this item, and the admission of evidence relating to it, presents one of the principal questions before us. The other arises upon the conclusion of the referee that if the plaintiffs shall, within a time limited, tender to the defendant a conveyance of all the interest which Williams at the time of his death had in the land lying in front of the lots above referred to, and on which the defendant's road is located, and release the defendant from all claim from damages arising from the location, construction, and use of its railroad in said street (except the damages above referred to), then the defendant shall pay the plaintiffs the further sum of $4,339.43, and interest from the date of the report, or in default of such payment the defendant shall be enjoined from using said railroad upon the land in front of the lots specified.

As to the question last stated, the case is plainly for the plaintiffs. Equitable relief is awarded, not as the defendant's counsel claims by way of menace, or as a means of compelling the payment of money, but that the defendant may desist from the unauthorized use of the plaintiff's property, and forbear from any further interference with their rights. To hold otherwise would leave the citizen remediless against the power of a corporation to acquire and use property without compensation, and to prevent that, the court ought not to be reluctant to exercise its jurisdiction. The facts in this case show that the entry upon the land in

[1] Part of the opinion citing and discussing authorities is omitted.

question was under the belief that the right to do so had been obtained, but it was not so, and the decree in this particular is just. The defendant is not required to pay the money. It may submit to the injunction. Nor did the referee exceed his jurisdiction in awarding it. All the issues in the action were referred to him to try and determine, and it was his duty to award the proper judgment. In the exercise of its equitable jurisdiction the court, or referee acting in its place, may give full relief, having regard to the rights and interests of both parties. It has done so in this case. In view of the annoyance and expense incident to the stoppage of the defendant's trains, it was just to open the doors of escape and permit the defendant at once to acquire title to the land occupied, and thus avoid the delay incident to other proceedings for that purpose, but it was, notwithstanding, optional with the defendant to comply with the conditions. The plaintiffs could not require it, but they would be bound by the judgment, and the defendant become, on performing the condition, purchaser of the land with rights not inferior to those obtained by appraisement and payment of damages under the statute. Wood *v.* Auburn and Rochester R. R. Co., 8 N. Y. 160. But the decision of this court upon the former appeal, Williams *v.* N. Y. C. R. R. Co., 16 N. Y. 97, established the plaintiff's right to an injunction, and nothing need be added upon this point.

As to the other question it was also then held that the right of the plaintiff to come into a court of equity, rested upon the fact that the trespass complained of was of a continuous nature, and that he might invoke its restraining power to prevent a multiplicity of suits, and could of course recover his damages as incidental to this equitable relief. It would seem, therefore, that the plaintiff should recover in this action all his damages, for if not, then the apprehended evil would not be averted, and the defendant would be subjected to fresh litigation from day to day, and neither party be better off than if the plaintiff had resorted to the other forum; but as it is, the court has power to do complete justice, and a purpose to render it must have been in the mind of the court upon the first appeal, or its language would have been qualified, and not general.

McRae *v.* The London, Brighton, and South Coast Railway Co., 37 Law Jour. R., 1868, Eq. p. 267, was not unlike the case before us. At the time of filing the bill the plaintiffs were entitled to an injunction against the railroad company, and damages were awarded at the hearing, although no injunction was in fact obtained, and the plaintiffs' interest in the land had meanwhile determined. The railroad had taken possession in good faith, but without making compensation. The Chancellor said: "I certainly entertain the impression that on questions of this kind where there is a doubt about the jurisdiction, or whether the court ought to interfere both for the sake of the plaintiff and the defendant, the court ought to stretch, rather than to narrow its jurisdiction, and that finding a question actually raised upon the pleadings which

either party has a right to have decided, it ought not to send a plaintiff who has fairly brought that question before the court to pursue his relief elsewhere," and so an inquiry was ordered as to the sum proper to be awarded the plaintiff in respect of the damages for the matters complained of in the bill.

It is, however, objected that the plaintiff should have in this action no damages save for the actual trespass up to the time of bringing the action, and should by successive actions have accruing damages, for the maintenance of the railroad, subsequent to the commencement of the action, or only nominal damages for the original trespass until by the action of ejectment he has possession, and that for damages for the depreciation in value above referred to he should wait until the defendant institutes proceedings to acquire title under the statute relating to that matter. If that is so, a court of equity is powerless, the multiplicity of actions not prevented, and a new and altogether useless litigation encouraged for no good purpose. I think the objections not tenable, and discover no reason for denying any relief to which the plaintiff would in any action, or before any tribunal, be entitled. The defendant has, for the purposes of its incorporation, entered upon an exclusive and permanent occupation of the land; embedded therein its track, and is enjoying it as fully as if the right to do so had been legally secured; in that event compensation must have been made to the owner, and the two things concurring, the title of the defendant would be complete, and the owner legally satisfied. The same result should be reached in this proceeding. The parties are before the court; they have had their day: Those matters have been passed upon which might have gone before commissioners under the statute, and for every trespass the plaintiff may recover in this action. For that reason only was it entertained. No doubt an action might have been brought for the original trespass, in entering and placing the railroad structures upon the land, and other successive actions for continuing it, for in such a case it is said that recovery of damages in the first action by way of satisfaction for the wrong, would not operate as a purchase of the right to continue the injury. Mahon *v.* N. Y. C. R. R., 24 N. Y., 658.

In the case at bar the injurious consequence was single, the result of one wrongful act, and could not be divided or estimated from day to day; it was not temporary, but permanent. The street was practically taken away so far as its uses as a street were concerned, and the injury was direct as affecting the property of the plaintiff, Beckett *v.* The Midland Railway Co., L. R. 3 C. P. 81, and the immediate depreciation of its value. In The Town of Troy *v.* The Cheshire R. R. Co., 3 Foster, 23 N. H. 83, while it was held that the plaintiff could recover only for the damages which had been sustained at the time of the commencement of the suit, yet it was considered that all the damages which the plaintiff had sustained, or could sustain, accrued when the defendant's road was built, and that only one recovery could be had; the court in

that case say: "Whenever the nuisance is of such a character, that its continuance is necessarily an injury, and when it is of a permanent character that will continue without change from any cause but human labor, then the damage is an original damage, and may be at once fully compensated, since the injured person has no means to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means," and there are other cases to the same effect.

This doctrine is of little practical importance if the power of a court of equity to give damages, when it has acquired jurisdiction, is confined to cases in which the plaintiff could recover damages at law, or if it is to measure them by the same rule. It is not. In Mayne on Damages, page 465, the learned author, speaking of the assessment of damages in the Court of Chancery, says: "The damages awarded differ from those which could be obtained at law, in being given by way of compensation for permanent injury once for all, not as at law where successive actions may be brought, and damages recovered *toties quoties*." Citing the language of Lord CRANSWORTH in Stokes *v.* The City Offices Co., limited, 13 L. T. N. S. 81; and see 2 Story's Eq. Jur. § 994. In Watson *v.* Hunter, 5 John. Ch. 169, Chancellor KENT says: "The remedy for waste already committed is merely incidental to the jurisdiction assumed to prevent multiplicity of suits, and to save the party from resorting to trover at law," and citing Jesus College *v.* Bloom, 3 Atk. 262, says: "The ground for coming into chancery was to stay waste, and not for satisfaction for the damages, as the commission of waste was a tort, and the remedy at law; but to prevent multiplicity of suits, . . . the court would make a complete decree, and give the injured party a satisfaction for what had been done, and not put him to an action at law." To the same effect is Smith *v.* Cooke, 3 Atk. 381; Bird *v.* The W. and M. R. R. Co., 8 Richardson Eq. 46. These views are also sustained by the decision of this court upon the first appeal. After discussing the rights of the respective parties, SELDEN, J., says: "It follows that the defendants in constructing their road upon Washington street without the consent of the plaintiff, and without any appraisal of his damages or compensation to him in any form, were guilty of an unwarrantable intrusion, and the trespass upon his property, and he is entitled to relief," and indicating, as it seems to me, the measure of relief, the learned judge says: "Although he had a remedy at law for the trespass, yet as the trespass was of a continuous nature he had a right to come into a court of equity, and to invoke its restraining power." Why? To prevent a multiplicity of suits, and can of course recover his damages as incidental to this equitable relief. And this general rule is well stated by EARL, J., in a recent case. Mad. Ave. Bapt. Church *v.* Bapt. Church in Oliver St., 73 N. Y. 95. "It is," he says, "the practice of courts of equity, where they have once obtained a jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down

to the close of the litigation between the parties." Again the court as one of equity may not only render full compensation to the plaintiff, but may do it on such terms as will secure to the defendant, rights corresponding to those given by the statute as a consequence of proceedings to acquire the right they have wrongfully taken. It has been done in this case. If the defendant complies with the conditions of the judgment, it is protected to the largest extent in the enjoyment of the roadway, and can be no longer, or in any other action, vexed. If it does not accept the conditions and chooses to proceed under the statute, the record of this judgment will prevent the allowance of any damages for injury to the land not actually taken, or for any cause covered by its provisions, Vedder *v.* Vedder, 1 Denio 257, and leave the defendant liable only for those which may be assessed for the roadway.

The judgment should be affirmed, with costs. All concur, except EARL, J., dissenting. Judgment affirmed.

WHEELOCK *v.* NOONAN.[1]

IN THE COURT OF APPEALS OF NEW YORK, 1888.

[108 *New York,* 179.]

Printed ante, p. 94.

[1] The doctrine of the principal case is of well-nigh universal application, and whether the injury sought to be enjoined is a repeated or continuous trespass equity will intervene and by a single decree right the wrong and bind the trespassers to keep the peace.

A striking example of the continuing trespass is that of a railroad running its trains over land belonging to the plaintiff. It is obvious that a right of action accrues with each passage, but the damages suffered and received will be limited to the act for which suit is brought.

The plaintiff does not want damages; he wants the trespasses stopped. This the strong arm of equity does, and having taken jurisdiction for one purpose, holds it for all. In one and the same action damages may be recovered for the trespasses as well as the injunction against the trespassers. See on this subject the interesting and principal cases, Williams *v.* N. Y. C. R. R. Co., 1857, 16 N. Y. 97; Henderson *v.* N. Y. Central R. R. Co., 1879, 78 N. Y. 423 *supra;* in which the Williams suit was ended after twenty years of litigation.

See for other acts of trespass, for which injunctions were granted, Hodgson *v.* Druce, 1856, 9 Jurist, n.s., 1014; Richards *v.* Dower, 1883, 64 Cal. 62, in which a defendant was properly enjoined from tunnelling under plaintiff's land; Goodson *v.* Richardson, 1874, L. R. 9 Chancery App. 221, in which defendant was enjoined from placing waterpipes in plaintiff's land.

For a collection of authorities on trespass, and the rules regulating the granting of injunctions, see the elaborate notes in 11 Am. Dec. 497-507; 22 L. R. A. 235-238.

STRAWBERRY VALLEY CATTLE CO. *v.* CHIPMAN.

IN THE SUPREME COURT OF UTAH, 1896.

[13 *Utah*, 454.]

Action by the Strawberry Valley Cattle Company against John I. Chipman for damages sustained by plaintiff in consequence of the trespass of defendant's sheep upon the land leased by the plaintiff from the Indians on their reservation at Uintah. Damages were asked for and also an injunction to prevent further injury to the grazing lands. From a judgment sustaining the validity of plaintiff's lease and enjoining defendant from further trespass, the latter appeals. Affirmed.

BARTCH, J. The evidence tended to show that the trespass complained of was continued and continuing until the service upon the defendant of the restraining order, and that grass and verdure were destroyed, and a portion of the leased land rendered worthless for the remainder of the term of the lease. Where acts of trespass are repeated, continuing, and ruinous, or the damage irreparable, and a remedy at law would be inadequate, an injunction will lie. Spell. Extr. Rem. § 337; High, Inj. § 697; Lembeck *v.* Nye (Ohio Sup.) 24 N. E. 686; Erhardt *v.* Boaro, 113 U. S. 537, 5 Sup. Ct. 565; Haines *v.* Hall (Or.) 20 Pac. 831; Hicks *v.* Compton, 18 Cal. 206; Boyce's Ex'rs. *v.* Grundy, 3 Pet. 210.

We are of the opinion that the respondent is entitled to the possession of the land in question, by virtue of its lease, and that there is no reversible error in the record. The judgment is affirmed.

MINER, J., and STREET, District Judge, concur.

KING *v.* STUART.

CIRCUIT COURT OF THE UNITED STATES, WESTERN DIVISION OF VIRGINIA, 1897.

[84 *Federal Reports*, 546.]

PAUL, District Judge. This is a suit brought by the plaintiff, Henry C. King, to restrain the defendants from cutting and carrying away the timber of the plaintiff on certain lands claimed by him, lying in Buchanan County, Va., the same being part of a tract of 500,000 acres lying in the States of Virginia, West Virginia, and Kentucky. The plaintiff traces his title from a grant by the commonwealth of Vir-

ginia to Robert Morris, dated June 23, 1795, and, through successive conveyances to himself.

The defendant H. C. Stuart demurs to the bill, and assigns as grounds of demurrer:

"First. That the said plaintiff has a full, complete, and adequate remedy at law, and is not, therefore, entitled to relief in equity for the matters complained of in said bill. Second. The said bill is in other respects uncertain, informal, and insufficient, and for other reasons to be assigned at bar."

The first ground of demurrer, viz. "that the plaintiff has a full, complete, and adequate remedy at law, and is, therefore, not entitled to relief in equity for the matters complained of in said bill," presents a clearly defined and important question for decision. A demurrer to a bill in equity admits the truth of the allegations of fact in the bill so far as the same are well pleaded. 1 Fost. Fed. Prac. § 108. The defendants in this cause, by their demurrer, admit that the complainant has title to the land mentioned in the bill lying within this district, and that he is in possession of the same. They likewise admit that the defendants have no title to said land; that they are not in possession thereof. They admit that the land is wild and uncultivated; that it is heavily timbered with a valuable growth of poplar, oak, walnut, and other valuable trees, and is practically worthless for agricultural purposes; that it was purchased by the complainant solely on account of the timber; that they have, against the protest of the plaintiff, entered upon said land, and have cut down, and are preparing and threatening to remove, a large quantity of valuable walnut and other timber; that they enjoy ready facilities for removing the same out of the State of Virginia into the States of Kentucky and West Virginia. They further admit the facts upon which it is alleged that these trespasses, if permitted to continue, will result in permanent and irreparable injury and damage to the land and to the plaintiff. Admitting these facts, the defendants insist that a court of equity cannot, by injunction, prevent an actual or threatened trespass going to the destruction of the growing timber, and thereby causing irreparable damage to the plaintiff. It has frequently been held by this court, and by the circuit court of appeals for this circuit, that, pending an action at law to try the title to land, an injunction will lie to prevent the cutting and removal of timber until the question of the title has been determined at law; that the interests of the parties should remain in *statu quo* pending the litigation of the title. The defendants in this cause insist that, as there is no action pending at law involving the title to the land, an injunction will not lie to prevent the destruction of timber, which the plaintiff alleges will result in irreparable injury to him. The contention of the defendants is that the plaintiff has a full, adequate, and complete remedy at law for any damage he may suffer by reason of the trespasses of which he complains; that this remedy is an action at law for damages, to be measured by the value of the timber re-

moved. That this was the doctrine at common law is admitted, but that its strictness has been greatly modified by the decisions of courts of equity in England and in this country is too well established to admit of discussion. A leading case in this country on this subject is that of Jerome *v.* Ross, 7 Johns. Ch. 315. In this case Chancellor KENT, while closely adhering to the common-law doctrine, said:

"In ordinary cases, this latter remedy (an action at law) has been found amply sufficient for the protection of property, and I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass which go to the destruction of the inheritance, or where the mischief is remediless."

He further says:

"I do not know a case in which an injunction has been granted to restrain a trespasser merely because he was a trespasser, without showing that the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass."

As cautiously and carefully as Chancellor KENT states the law, it seems that his view of the doctrine would cover the case at bar, and entitle the plaintiff to an injunction. But the law of injunction against trespass has, since the decision in Jerome *v.* Ross, been relaxed and expanded until now it it held that an injunction will lie to restrain trespass whenever the injury done or threatened would result in irreparable injury, or the defendant is insolvent. It will also be granted where the entire wrong cannot be redressed by one action at law for damages; this on the principle that equity will interpose by injunction to prevent a multiplicity of suits. The result of the recent English and American decisions is very clearly stated in Pom. Eq. Jur. § 1357, as follows:

"If a trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere. The principle determining the jurisdiction embraces two classes of cases, and may be correctly formulated as follows: (1) If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable,—that is, if the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced by means of compensation in money,—then the wrong will be prevented or stopped by injunction. (2) If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions. In both cases the ultimate criterion is the inadequacy of the legal remedy."

A note to this section says:

"The legal remedy is not adequate simply because a recovery of pecuniary damages is possible. It is only adequate when the injured party can, by one action at law, recover damages which constitute a complete and certain relief for the whole wrong,—a remedy virtually as efficient as that given by a court of equity. This conclusion is sustained by the concensus of modern decisions of the highest authority, although it cannot be claimed that the cases are unanimous in its acceptance."

In Spell. Extr. Relief, § 14, it is said that:

"Injunction will lie to prevent threatened trespass, though the damages be susceptible of compensation, or otherwise there is a probability of the wrong being often repeated, and the plaintiff thereby involved in a multiplicity of suits."

In Id. § 346, it is said:

"Especially will relief be granted where trespass of cutting timber amounts to the destruction of the essential value of the estate in the character in which it has been enjoyed."

Beach, Mod. Eq. Jur. § 22:

"While, ordinarily, courts of equity will not interfere merely to redress a trespass, they will do so where the trespass is a continuing one, and a multiplicity of suits is involved in the legal remedy."

Id. § 721:

"Where trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy at law for damages is adequate, equity will not interfere; but, if repeated acts of trespass are done or threatened, although each of these acts, taken by itself, may not be destructive, or involve irreparable injury, and the legal remedy may, therefore, be adequate for each single act if it stood alone, the entire wrong may be prevented or stopped by injunction. . . . Equity will also interfere where the trespass is a continuous one, and the legal remedy would involve a multiplicity of suits."

The contention of counsel for the defendants that an injunction to prevent the destruction of trees is confined to trespasses which destroy groves kept for beautifying the owner's home or lands, or to shade and ornamental trees, cannot be sustained. The modern decisions apply the relief by way of injunction to coal, iron, and other mines, and to growing timber in a forest.

Applying the doctrine laid down in the authorities above quoted, I find no difficulty in deciding that the temporary injunction in this cause was properly awarded, and should be perpetuated. The trespass committed is not a single act, temporary in its nature, and such as might be compensated for by a single action for damages, but is continuous from day to day, and, if permitted to continue, will ultimately result in the entire destruction of the valuable timber admitted to belong to the plaintiff. The damage done the plaintiff to-day by cutting his timber is the foundation for an action of damages. The measure of recovery, on the

damages laid in the writ in an action brought for this trespass will be the injury suffered by the plaintiff to the time of bringing his suit. To-morrow the defendant commits further injury by cutting other timber, thus giving the plaintiff another cause of action, and requiring him to bring another suit, if he is to be remitted to his remedy at law; for it is not to be presumed that the plaintiff will stand idly by until the destruction of his property is complete, and, by his acquiescence, perhaps endanger his right of recovery of damages for the injury done him. This statement shows the multiplicity of suits to which the plaintiff would have to resort for redress, and at the same time it shows the futility of the plaintiff's remedy at law,—a remedy which must be full, complete, and adequate. The remedy by an action at law for damages against a trespasser may have been an efficient remedy at common law. But at this day, when property of all kinds readily and easily changes hands; when a man who is solvent to-day may be insolvent to-morrow; when the ready means of transportation quickly conveys personal property from one section of the country to another, perhaps out of the jurisdiction of the courts which have been established for the protection of property rights; and when we consider the long delays that often precede a trial, a judgment, and execution,—we see how entirely inadequate is the remedy at law to secure compensation to a person whose property is destroyed by a trespasser. So far from his remedy at law being full, complete, and adequate, he may find himself, at the end of his litigation, with a naked execution in his hands, with no means for its satisfaction. In the meantime his most valuable property interests have been destroyed.

The only remaining question for discussion is: Is the damage that will result to the plaintiff if the defendants are permitted to cut and carry away his valuable timber irreparable? It must be conceded that every man has a right to enjoy his own property in his own way; that he has a right to say how long he will keep it, and when and how he will dispose of it. In the case of a heavily-timbered tract of land, like that of the plaintiff, it is his right to say what part of it, if any, or what particular trees or kinds of trees, he will cut, and what he will leave standing. It is difficult to find any kind of property that will suffer more by unrestrained trespasses, or that is more difficult to be compensated for in damages after its destruction than a forest of growing timber such as the plaintiff's. The trees are increasing in size and value from year to year; the younger trees are constantly reaching nearer the size at which they can be profitably utilized, and are constantly rendering the estate more valuable. Coal and ore, if taken from mines, may be measured as to quantity and value. They have no increasing value by reason of growth, but are of fixed quantity. Yet the removal of coal and ore from mines is held to work irreparable damage to the property of the owner of the mine. The court knows of no measure of damages that could be adopted by a jury that would properly estimate what would be the value of a body of timber five years hence that is destroyed by a trespasser to-

day. The court has no hesitancy in holding that the destruction of the plaintiff's timber by the defendants, as they threaten to do, and were doing when restrained, would result in irreparable damage to the property of the plaintiff, and that the plaintiff is entitled to the protection of a court of equity.

Section 3. Nuisance.

SOLTAU *v.* DE HELD.

In Chancery, before Lord Cranworth, V.C., 1851.

[2 *Simons, New Series,* 133.]

The plaintiff occupied a messuage as a private dwelling which adjoined a messuage used as a chapel by a religious order called "The Redemptorist Fathers." The plaintiff alleged that the ringing of the chapel bells at the times and in the manner practiced by the defendant rendered the occupation of the plaintiff's messuage uncomfortable and amounted to a nuisance and prayed for an injunction.

The Vice-Chancellor.[1] The next ground insisted upon in support of the demurrer, was that the plaintiff had not established his right at law. Now, it is true that equity will only interfere, in case of nuisance, where the thing complained of is a nuisance at law: there is no such thing as an equitable nuisance; but it is no ground of demurrer that the matter has not been tried at law. It very often is a ground for refusing an injunction; but it is not ground of demurrer, as appears from Berkley *v.* Ryder, and from Lord Cottenham's judgment in Elmhirst *v.* Spencer, where his Lordship expresses himself thus: "The plaintiff, before he can ask for the injunction, must prove that he has sustained such a substantial injury, by the acts of the defendant, as would have entitled him to a verdict at law, in an action for damages." And then, in another part of the same judgment, he says: "This court will not take upon itself to adjudi-

[1] The balance of the case has been omitted.

"The English Court of Chancery rarely uses this process, except where the right is first established at law, or the exigency of the case renders it indispensable. Thus, in Brown's case, in 2 Vesey 414, a motion was made for an injunction to stay the use of a market, and Lord Hardwicke said it was a most extraordinary attempt, and that the plaintiffs had several remedies which he might use. He said it would cause great confusion to bring into contempt upon the injunction all persons who might use the market, and that if the Court ought to interpose at all, it would be after the title was established at law. So he observed, in another case, Amb. 209 Anon., that the Court granted an injunction to stay the working of a colliery

cate upon the question whether this is a nuisance or not: that must be ascertained in a Court of Law, as laid down by Lord ELDON in The Attorney-General *v.* Cleaver." Now, in The Attonery-General *v.* Cleaver, which was a case of public nuisance, Lord ELDON directed the indictment, which had been already brought and was pending, to be prosecuted, and ordered the motion to stand over until the hearing of it. Therefore, Lord COTTENHAM, in that case, is referring to this; that you cannot ask for the injunction if there be a question about its being a nuisance at law. But I do not know where it is laid down that a bill will not lie, that is, that it is ground of demurrer because the action has not yet been brought.[1] However, whether that be so or not, the plaintiff in this case has brought his action at law, and obtained a verdict.

with great reluctance, and will not do it, except where there is a breach of an express covenant, or an uncontroverted mischief. In a late case before Lord ELDON, Attorney-General *v.* Nichol, 16 Vesey 338, on an information filed to restrain the defendant from obstructing the ancient lights of an hospital he stated that the foundation of this jurisdiction by injunction was that head of mischief, or those mischievous consequences, which required a power to prevent as well as to remedy, and that there might be nuisances which would support an action, but which would not support an injunction." Per Chancellor KENT in Attorney-General *v.* Utica Insurance Co., 1817, 2 Johnson's Ch. 371, 379.

For the reasons stated in the next principal case, equity prefers not to grant an injunction if the title be doubtful, or has not been established at law. White *v.* Cohen, 1852, 1 Drew. 312; but equity should not hesitate if the title is clear, though untried. Turner *v.* Mirfield, 1865, 34 Beav. 390. An interlocutory injunction should be granted irrespective of title if necessary to preserve the property. Irwin *v.* Dixon, 1850, 9 How. 10, citing authorities. See also Tex. & Pac. R. R. *v.* Interstate Trans. Co., 1894, 155 U. S. 385.

The course of development in nuisance is similar to that of trespass, and the final result will doubtless be the same.

[1] "But after a court of equity has entertained a bill, and, instead of sending the case to be tried at law, has itself tried the questions of fact involved, and settled the legal right in favor of the complainant, it certainly would be a result much to be deprecated, if, at such a stage of the controversy, it was the law that the chancellors were required to say to such a complainant, 'your right is clear; if you sue at law you must inevitably recover, and after several such recoveries, it then will be the duty of this court, on the ground of avoiding a multiplicity of suits, to enjoin the continuance of this nuisance; still, you must go through the form of bringing such suits, before this court of equity can or will interfere.' In those cases in which, to the mind of the Chancellor, the right of the complainant is clear . . . so that his right to recover damages at law is indisputable, and the Chancellor has considered and established his right, I think it not possible that any authority can be produced which sustains the doctrine contended for by the counsel of the defendant," i.e., that the plaintiff must first recover at law. Per BEASLEY, C.J., in Higgins *v.* Flemington Water Co., 1883, 36 N. J. Eq. 538, 544-5.

DUKE OF GRAFTON *v.* HILLIARD.

IN CHANCERY, BEFORE LORD CHANCELLOR TALBOT, 1736.

[1 *Ambler (Blunt's edition)*, 160, *note.*]

Defendant had taken a building lease of some ground behind New Bond Street and the soil there being proper for that purpose he had made a very large quantity of bricks and was going to burn them upon the spot, and now the plaintiffs brought a bill suggesting it would be a very great nuisance, that the smoke would make the air very unwholesome and would spoil the houses and furniture of plaintiffs who were near neighbours, and upon the coming in of defendant's answer they moved upon the merits for an injunction to hinder the defendants from burning the bricks so near the plaintiff's houses. Defendant coming to shew cause insisted that as he had a property in the soil he might make use of it to what purpose he pleased, that by the terms of his agreement he was obliged to burn the bricks before such a particular day, which if an injunction was granted the time would be elapsed before the cause could be heard, and so the defendant would quite lose the opportunity of burning the bricks he had already made to the value of at least £500 and interest, and insisted that this was no nuisance, but if it was the parties injured had their remedy by action after their damages sustained. The Lord Chancellor recommended it to them to try it immediately in a feigned action whether it would be a nuisance or not, but defendants would not come into that, and therefore the Lord Chancellor declared that it was too much for him to determine, upon a motion, whether this would be a public nuisance or not, especially seeing how many brick kilns are now standing in all parts, and in some places almost in the heart of some of the principal streets; that if he should grant an injunction and it should come out on the hearing that it was no nuisance, he could not possibly make the defendant amends, for his time for burning would be expired; and if it was a nuisance defendant would be sufficiently punished by actions which might be brought against him by every one of the parties that suffered any damage; and this was not like the cases of cutting down avenues or the like, which if done no possible amends or satisfaction could be made to the parties; but here if the furniture or goods were hurt by the smoke, the sufferer would have a remedy at law; and if brick kilns were general nuisances it seemed strange that so many of them should be permitted to stand in the several quarters of this town.[1]

[1] On the question of brick kilns, see the valuable and sensible case of Phillips *v.* Lawrence Vitrified Brick & Tile Co., 1905, 82 Pac. 787; S. C. 2 L. R. A., n.s., 92, with note collecting authorities.

This case is considered by some a public, as distinct from a private, nuisance,

COULSON *v.* WHITE.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1743.

[3 *Atkyns* 21.]

See case as printed ante, p. 679.

BAINES *v.* BAKER.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1752.

[3 *Atkyns*, 750.[1]]

A motion was made for an injunction to stay the building of a house to inoculate for the smallpox in Cold Bath Fields.

Lord Chancellor:—

The application is to be considered in two lights:

First, Whether the thing complained of be a nuisance?

Secondly, If a nuisance, whether of a public or a private nature?

Now it is not settled, that a house for the reception of inoculated patients is a nuisance.

Upon an indictment of that kind there hath been lately an acquittal after a trial at Rye in the County of Sussex.

and has been cited as an authority that the law in 1736 permitted a private person to file a bill to abate a public nuisance. If the nuisance be public, it is such a precedent.

Lord ELDON, however, was of the opinion that it was a private nuisance, and that it therefore was not such an authority. In The Attorney-General *v.* Cleaver, 1811, 18 Ves. 211, 218, the following cases were cited before Lord ELDON: Coulson *v.* White, Ryder *v.* Bentham, and The Attorney-General *v.* Doughty; upon which his Lordship commented as follows:

"Ryder *v.* Bentham is a case of private nuisance. I can find no other cases than those which have been mentioned, except The Duke of Grafton *v.* Hilliard, in which the Attorney-General was not the plaintiff, but the Duke of Grafton filed the bill to restrain the defendant from burning brick earth in the fields close to Hanover Square. The note I have gives me no information upon the doctrine as to public nuisance, amounting to no more than this—that the Court refused the injunction, observing that the manufacture of bricks, though near the habitations of men, if carried on for the purpose of making habitations for them, is not a public nuisance."

[1] Reported also in 1 Ambler, Blunt's edition, 158.

The notion of a private nuisance is, where it affects only particular persons, as in stopping up ancient lights, etc.[1]

It then becomes a public nuisance when it affects many persons, though it may likewise at the same time be of a private nature too, as in the case of a hole in the King's highway, etc.

For it is not confined to the particular property of the plaintiffs, because it is in the nature of terror to diffuse itself in a very extensive manner.

But bills to restrain nuisances must extend to such only as are nuisances at law.

And the fears of mankind, though they may be reasonable ones, will not create a nuisance.

Had it been a nuisance, the proper method of proceeding would have been by information, in the name of the Attorney-General.

Upon the circumstances of this case, I am of opinion I should not be justified in granting the injunction which is now prayed, and therefore must deny the motion.

ATTORNEY-GENERAL *v.* CORPORATION OF MANCHESTER.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION, 1893.

[*Law Reports* (1893), 2 *Chancery Division,* 87.]

The defendants proposed to establish a smallpox hospital on land of their own in an adjoining district, within 240 yards of two public roads, within 90 yards of a much used part of a cemetery, and within 256 yards of the nearest residence; the plaintiffs contended that what the defendants proposed to do amounted to a public nuisance, as being dangerous to the health of the neighborhood, and applied for an injunction:—[2]

CHITTY, J.—This is the third motion which has been made against the Corporation of Manchester in respect of the hospital they propose to open in the district of the Withington Local Board for the reception of smallpox patients. The present action is brought by the Attorney-General, not *ex officio,* but at the instance of relators, and also by private persons as plaintiffs; but the case of the private plaintiffs was not argued at the

[1] For the doctrine of ancient lights and their abatement as a nuisance—a doctrine not recognized in this country in the absence of a specific covenant—see, East India Co. *v.* Vincent, 1740, 2 Atk. 83; Morris *v.* Berkeley, 1752, 2 Ves. Sr. 453; Fishmonger Co. *v.* East India House, 1752, 1 Dick. 165; Ryder *v.* Bentham, 1755, 1 Dick. 277; S. C., 1755, 1 Ves. Sr. 543; Attorney-General *v.* Nichol, 1809, 16 Ves. 340.

[2] This statement of facts is taken from the headnote. The arguments of counsel have been omitted.

bar. The foundation of the motion is an apprehended public nuisance, the nuisance being, not an actual or existing nuisance, but a future nuisance, which, it is alleged, will arise if the hospital is opened. The action, then, is what is technically known as a *quia timet* action. The question as to the principle on which the court proceeds in granting or refusing an injunction in such actions has been the subject of numerous decisions, among which are Crowder *v.* Tinkler, 19 Ves. 617; Earl of Ripon *v.* Hobart, 3 My. & K. 169, 176; Haines *v.* Taylor, 2 Ph. 209; Hepburn *v.* Lordan, 2 H. & M. 345; Attorney-General *v.* Mayor of Kingston, 34 L. J. Ch. 481; 13 W. R. 888, 891; Salvin *v.* North Brancepeth Coal Company, Law Rep. 9 Ch. 705; Fletcher *v.* Bealey, 28 Ch. D. 688. The principle appears to be the same whether the alleged future nuisance is public or private. In one of the cases to which I have referred, the alleged nuisance was a public nuisance; in others a private nuisance. In some, acts had been done which, it was alleged, would result in future mischief or injury, but which had not already resulted in injury or substantial damage; in others, there was mere threat or intention. But in regard to all such cases the principle is the same. Where it is certain that the injury will arise, the court will at once interfere by injunction; as, for instance, in the case of a threat to cut a permanent ditch across a public highway. But the court does not require absolute certainty before it intervenes; something less will suffice (see Lord BROUGHAM'S judgment in Earl of Ripon *v.* Hobart). In Crowder *v.* Tinkler (the gunpowder case), Lord ELDON, who granted the injunction, spoke of "extreme probability of irreparable injury," 19 Ves. 622. In Attorney-General *v.* Mayor of Kingston, Vice-Chancellor WOOD, who refused the injunction, considered the question to be whether there was evidence of an actual nuisance committed, or "evidence of the extreme probability of a nuisance if that which was being done was allowed to continue." In Fleet *v.* Metropolitan Asylums Board, 1 Times L. R. 80; 2 Times L. R. 361, 362, the Darenth Hospital Camp case, where the hospital was in actual operation, the court refused the injunction, Lord Justice COTTON, in his judgment, laying it down that "the plaintiffs must take out that there was real danger, otherwise, however much they might feel the hospital to be an annoyance, they could not get an injunction." The principle which I think may be properly and safely extracted from the *quia timet* authorities is, that the plaintiff must shew a strong case of probability that the apprehended mischief will, in fact, arise. Before stating the facts, I will make a few observations in regard to public nuisance at common law. The plaintiffs' case is that the defendants are proposing to do acts which, if done, will constitute a common or public nuisance, and as such will constitute an indictable offence. A great variety of instances of the different kinds of public nuisances will be found collected in Russell on Crimes, 5th ed, vol. i. p. 418, *et seq*, and in Stephen's Criminal Digest, 3d ed. p. 126, including Rex *v.* Vantandillo, 4 M. & S. 73, and Rex *v.* Burnett, ibid. 272, both smallpox cases, and cited at the bar in argument

before me. Those two cases shew that, although no actual mischief had arisen from the acts done, there may be an indictable offence if there is danger to the public health. In Reg. *v.* Lister, the naptha use. Dears & B. C. C. 209, the keeping of large quantities of a highly inflammable fluid near a highway to the danger of the public was held to be an indictable offence, though no fire had taken place. In the Darenth case Sir F. FRY appears to have adopted, as applicable in such cases, Chief Justice COCKBURN'S statement of the law, that it must be shewn that there is "a well-founded and reasonable apprehension of danger." The apprehended future danger in the present case is danger to the public health. Now, undoubtedly, there are many cases of public nuisance—by interference with an unquestionable right of the public, such, for instance, as the permanent obstruction of a highway—where the court did decline at once to permit evidence to be given of any supposed public benefit arising from the wrongful act complained of, and would refuse to balance the good alleged to accrue to some portions of the public against the mischief to the public in general. But in the case where the health of the Queen's subjects in general is concerned, it may possibly be a question whether, if the evidence shews that the maintenance of a smallpox hospital is, on the whole, balancing the good against the evil, more beneficial to the health of the public at large, or to that portion of the public that inhabits or frequents the neighborhood, than the leaving of the persons suffering from the disease scattered in their own homes, some weight might not be properly allowed to this circumstance. If Lord HARDWICKE is rightly reported in the case of Coldbath Fields Smallpox Hospital—Baines *v.* Baker, Amb. 18, he appears to have entertained some such question when he stated his opinion that the hospital was "a charity like to prove of great advantage to mankind." But, although I throw out these observations as being possibly worthy of future consideration, I state expressly that they do not form any ground of my decision on this motion. I now proceed to deal shortly with the facts.[1]

The conclusion at which I have arrived is that the plaintiffs have failed on this motion to make out that there is a probability, must less that there is a high degree of probability, that the apprehended danger will in fact ensue. In parting with the case I think it right to say that the court ought to exercise great caution before it accepts any general proposition of fact which might tend to the closing of many a well-ordered smallpox hospital in the country. The necessity for caution is all the greater because the doctrine of coming to a nuisance has long since been excluded. I, for the reasons given, refuse the injunction.[2]

[1] A part of the opinion discussing the facts has been omitted.

[2] "Inoculation was, it is well known, introduced into this country in the early part of the eighteenth century. It consisted in artificially communicating the smallpox in such a manner that the patient took it in a very mild form; but was as much a source of infection to others as if the disease had been taken in the natural manner. The introduction of the practice

ATTORNEY-GENERAL *v.* FITZSIMMONS.

IN THE PULASKI COUNTY COURT OF ARKANSAS, 1896.

[35 *American Law Register* 100.]

MARTIN, C.[1]—Under the act of 1885 and secs. 2380 of S. & H. Dig., I believe it is conceded that this court might have put Corbett and Fitzsimmons under bonds to keep the peace, in sums not exceeding $5,000; and from this, it is argued that no jurisdiction exists to do more. The section of the digest last referred to, applies to officers of courts of law particularly, though I doubt not this court also has the power to enforce it in a proper case. But is that remedy in a court of equity exclusive.

The bill alleges, and the demurrer confesses, that a bond of $5,000, the maximum bond which, under the statute, could be required, would not prevent the fight, and would not prevent the other acts complained of in the bill, among them the public nuisance, which is minutely described. It follows, then, as certainly as night the day, that unless the Chancellor could apply some other remedy than that of a mere bond to keep the

was vehemently opposed. In 1752 a case came before Lord HARDWICKE, which is reported in two reports. Baines *v.* Baker, 1 Amb. 158; S. C. Anon. 3 Atk. 750. I collect from the two reports that it was proposed by private persons to erect a building in Coldbath Fields to be used as a hospital for the reception of persons ill of the smallpox, and also for the reception of persons who were there to be inoculated. The plaintiff was, it appears, owner of building land in the neighborhood, and gave evidence (of something which seems very probable) that the fears of infection from the proposed hospital greatly deteriorated the letting value of his property. Lord HARDWICKE refused to grant an injunction, saying, what is undoubtedly law, that loss arising from the fears of mankind, though in themselves reasonable, would not create a nuisance at law, and that before he could grant an injunction he must be satisfied that what was proposed to be done would be a legal nuisance affecting the plaintiff's private rights. He is reported in Ambler to have said that he thought 'such a charity was like to prove of great advantage to mankind; such an hospital must not be far from a town, because those that are attacked with that disorder in a natural way may not be in a condition to be carried far.' This I think very true, and it is to be borne in mind when construing the act now in question. Lord HARDWICKE seems to have decided that the plaintiff made out no case of a nuisance to his private rights; and that even if the maintenance of a place for the artificial propagation of smallpox was indictable, which seems not to have been Lord HARDWICKE'S opinion, that was a public and not a private nuisance.

"In Rex *v.* Sutton, 4 Burr. 2116, in 1767, it was held that an indictment for maintaining a house for inoculating for the smallpox was not so plainly bad as to be quashed on motion. This is all that appears from the report,

[1] Portions of the opinion are omitted.

peace, limited as it is to the sum of $5,000, that the power conferred, and the duty enjoined upon him, would fall far short of enabling him to adequately maintain the good order of the State government, whose peace he is to conserve.

It were the rankest folly, the sheerest nonsense, to direct an officer to conserve the peace throughout the State, and then deny him the necessary jurisdiction and power to do so wherever an emergency should arise which demands the exercise of such powers as may be necessary to accomplish the purpose. As I will show before I conclude, courts of equity have exercised jurisdiction by injunction to prevent the commission of certain crimes, indeed, they should of any crime involving the commission or maintenance of a public nuisance, as does the one charged in the bill in this case. And why not? The very objects of government are to restrain men's passions, to bridle improper and illegal impulses, to protect them in their civil and political rights of life, limb and property, to subserve the general welfare, and to induce, or make them, if necessary, respect the rights of others. 'Tis true, a court of equity, under our system of laws, cannot administer punitive justice, ex-

but from what Lord ELLENBOROUGH says in Rex *v.* Vantandillo, 4 Man. & S. 76, it would appear that there had been much more discussion at the time.

"In Rex *v.* Burnett, 4 M. & S. 272, in 1815, it was decided that though inoculation for the smallpox may be practiced lawfully and innocently, yet it must be under such guards as not to endanger the public health by communicating this infectious disease. And I also think that, by necessary inference, it follows that to gather together in one spot patients suffering from infectious disease is lawful, but it must be under such guards as not to endanger the public health by communicating this infectious disease; and, as it seems to me, so as not to produce injury to the rights of the owners of adjoining property by producing a nuisance to it.

"If this be the correct view of the law, it is obvious that, however desirable it might be to erect and maintain asylums for the reception of the sick poor, sick of infectious disorders, it could not be done by any parochial authorities unless the authority of Parliament was obtained for raising funds for the purpose, and authorizing a public body to obtain a site for the asylum. And the Metropolitan Poor Act, 1867, certainly created such a body and gave it powers to raise money, and without farther powers this body could erect an asylum, provided it was done in such a manner as neither to endanger the public health, nor to form a nuisance to private property. It is, for the reason given by Lord HARDWICKE, necessary that the site for such an asylum should be not far from the places where the patients fall sick, and consequently, in the case of the metropolis, in an inhabited district." Per Lord BLACKBURN in Metropolitan Asylum District *v.* Hill, 1880, L. R. 6 App. Cas. 206-207.

"The other case which has been referred to, Baines *v.* Baker, Amb. 158, was an application to restrain the erection of a smallpox hospital which had not yet been built. The erection could only be restrained if a smallpox hospital, when erected, must of necessity be a nuisance, and Lord HARDWICKE only decided that he could not say beforehand that it must of necessity

cept for contempts; but it may preventive justice in proper cases; and I feel that if there were more preventive justice administered, a vast deal of misery would be spared to the innocent. Many a sorrowful wife and innocent, helpless child has been made to suffer the want of absolute necessaries of life, because of the father's condemnation to a sentence of punitive justice—under a jail or penitentiary sentence—but never, in the very nature of things, has one, and one never can, on account of the administration of preventive justice. In most cases, per force of circumstances, preventive justice cannot be enforced; because, first, the contemplated crime is not known; and if it were, it can generally be prevented by the statutory peace bond proceeding in a court of law. But there are exceptions to the rule; and the exception proves the rule. Courts of equity will not, generally, interfere by injunction to prevent the commission of ordinary crimes, and this is upon the principle that an adequate remedy exists at law. But what have we here as shown by the complaint and confessed by the demurrer? A comparatively small part of the State in league with a few prize fighters and their trainers, bonded together in a collusive determination to openly violate the statutes of the

be a public nuisance. If when it had been erected it had been so conducted as to prove a public nuisance, there would have been a very different question, viz., that which arose in the case of the Hampstead Hospital.

"In the present case all that it is necessary to decide is this, that this act does not authorize urinals to be erected so as to be a nuisance, and we agree with the decision of the Vice-Chancellor that the maintenance and use of this urinal is a nuisance." Per COTTON, L.J., in Vernon *v.* Vestry of St. James, Westminster, 1880, L. R., 16 Chancery Division 470.

"It is doubtless attributed to Lord HARDWICKE that he once said, 'The fears of mankind, though they may be reasonable ones, will not create a nuisance.' But if Lord HARDWICKE ever really did say so, it is quite clear that that is not now the law, if the fears are assumed to be reasonable. The existence of a large collection of explosive matter in the vicinity of a town has been held to be a nuisance. See Reg. *v.* Lister, Dears & B. C. C. 209; 26 L. J., M. C., 196.

"The good sense of mankind recognizes the fact that occasional negligence is one of the ordinary incidents of human life, and the common law, which embodies the common sense of the nation, proceeds upon common sense assumptions. I do not think it is any answer to tell people who complain of the establishment of sewage works in their neighborhood that if and when the sewage works became a nuisance, in the real and proper sense of that word, such works can be restrained by injunction. Land is certainly more marketable when it is free from works of that character than when such works are established, although the neighbors may have the ordinary right of citizens to engage in litigation against such works when they become a nuisance.

"I have, therefore, come to the conclusion that it was open to the jury to find that the appellant's land not taken by the local board would be injuriously affected by the construction and use of the sewage works." Per Lord HALSBURY, L.C., in Cowper *v.* Local Board of Acton, 1889, L. R. 14 App. Cas. 153, 160-1.

State, flinging defiance in its face, and saying to the constituted authorities of the State government, "we will be protected by local authorities, and you are powerless to vindicate the majesty of your laws, to preserve the good name of the State, to uphold its institutions, or to conserve its peace."

The Governor has run the gamut of executive functions to find legal power or authority, lodged in him as the chief executive, to lay hold of the threatened infraction of the statutes, and by reason of the restrictive constitutional limitations upon his power, he could legally do nothing, without the aid of some court, to accomplish a proper conservation of the peace in that part of Arkansas' domain. The Attorney-General of the State for a few days preceding the day fixed for the fight was in the city of Hot Springs—on the ground—and on his return filed the bill in this case, which was by him duly verified.

He says in the bill of complaint " that in open defiance of the laws of the State, of its peace and good order, of its good name and general welfare, all the defendants herein, and many others whose names are to the plaintiff unknown, undertook such measures as were deemed necessary by them to bring about said fight in said Garland County, in or near said city of Hot Springs. They publicly, boldly and defiantly proclaimed that said fight would occur. They advertised the fact throughout the entire country that the fight would occur for the championship of the world, and in every way and by all means, sought to induce persons to come from all over the land to witness the fight, and openly stated that the attendance would be some fifty thousand people; that accommodations would be made to seat that number to view the fight."

He also avers in the bill "that if said fight occurs, it will seriously endanger the lives of the participants who are gifted with extraordinary strength and skill, fight for a very large stake, as well as for the championship of the world, and entertain feelings of intense hostility towards each other. That it will bring together from all parts of the country a lawless, violent, turbulent and dangerous assemblage of many thousand of persons, and will cause riots and affrays, seriously endangering the safety of many others, to the prejudice of the good name and general welfare of the State. That the assemblage and fight contemplated would constitute a public nuisance, which would endanger not only the lives of persons not engaged or participating in it, but property generally; and if the Governor of the State exercises his power to call out the militia, its efforts to prevent the fight will be resisted and many persons will be injured, perhaps killed, as defendants, their aiders and abettors, now declare."

However, we need not resort to any consideration of a public necessity to maintain the laws and dignity of the State, nor to that principle of equity jurisprudence, that courts of chancery will intervene to prevent a multiplicity of suits, to sustain the jurisdiction of the court over the subject-matter of this action. While conceding that courts of equity have

no power to enforce the criminal statutes of the State, and no jurisdiction to enjoin the commission of crimes ordinarily, yet where the crime arises from, or is a constituent part of a public nuisance, they should not fail to exercise their extraordinary powers to abate the nuisance; and in doing this, they may, by proper orders, prevent the commission of the crime. Vice-Chancellor SHADWELL so thought when he delivered his opinion in Attorney-General *v.* R. Co., 4 De G. & S. 75.

The case of Columbia Athletic Club *v.* State, 28 L. R. A. 727, from which a number of quotations have been made, and in which several cases cited in this opinion are used, was one instituted to enjoin an athletic association from "pulling off" an industriously advertised prize fight, and to put the property of the association in the hands of a receiver. The Chief Justice, who delivered the opinion of the court, affirmed the judgment of the lower court in making the injunction perpetual, and going a step farther than I have gone in this case, by appointing a receiver to take charge of the club house and grounds of the association, in order to prevent the fighting of the pugilists, says: "It would be monstrous to adjudge that, because acts constituting the abuse of corporate privileges are crimes, therefore the corporation may persist in doing them. This would be to encourage corporations to perpetuate the gravest abuses, since, under such a rule, the graver the abuse the less the power of the civil branch of our law. It comes with an ill grace from a corporation to aver that, because the abuse of its corporate privileges consist of committing crime, civil remedies are unavailable. It would outrage common sense unspeakably to give ear to a corporation defending itself against a civil proceeding by asserting its own infamy and insisting that redress can only be had under the laws punishing the crimes." A like conclusion was reached in Massachusetts, in the case of Carleton *v.* Rugg, 149 Mass. 550, 5 L. R. A. 193, the language of the court being: "The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance." See, also, Morawetz Priv. Corp., par. 1043. . . .

"Judge BREWER, *in re* Petition of Debs, 158 U. S. 564, for the Supreme Court of the United States, says: The jurisdiction of the court of chancery with regard to public nuisances is founded on the irreparable damage to individuals, or the great public injury which is likely to ensue. 3 Daniell's Ch. Pr. 3d ed., Perkin's, 1740. Indeed, it may be affirmed that in no well-considered case has the power of the court of equity to interfere by injunction in cases of public nuisance been denied, the only denial ever being that of a necessity for the exercise of that jurisdiction under the circumstances of that particular case. Story's Eq. Jur. par. 921, 923, 924; Pomeroy's Eq. Jur. par. 1349; High on Injunctions, par. 745 and 1554; 2 Daniell's Ch. Pl. and Pr. 4th ed., p. 1636."

That the complainant filed by the Attorney-General in this case alleges facts which constitute a menace to the lives of citizens, with destruction of their property, the disturbance of the peace and tranquility of the

community, the general welfare and reputation of the State, and a great public nuisance, calling for the exercise of all the legitimate powers of this court to abate and prevent the consummation of the threats alleged in the bill, I think, is not open to question. . . .

Recurring to the remedy, I find that in cases of public nuisances, it must be either preventive or punitive, the one accomplished by injunction, and the other by an indictment on behalf of the public.

The most efficient, humane and flexible remedy is that of injunction. Under this form the court can prevent that from being done which, if done, would cause a nuisance; it can command an observance of peace before it is broken; it can save suffering, and sometimes disgrace, to those who are in no way responsible; in some instances, and I believe this case presents one of them, it can secure an obedience to the laws of the country that a court of law, pursuing the other remedy, could not do.

My conclusions are:

(1) That jurisdiction over the persons of such of the defendants as voluntarily came into Pulaski County, and were summoned here, is given by the statute quoted in this opinion;

(2) That the complaint charges such a state of facts as constitute a public nuisance in the eyes of the laws of this State;

(3) That the demurrer admits the material allegations of the complaint to be true;

(4) That a court of equity has ample jurisdiction to prevent, or abate by injunction, a public nuisance, in a civil action instituted by the sovereign on the relation of her Attorney-General;

(5) That the power to prevent or abate the nuisance involves the jurisdiction to make all orders that may be necessary, and that of a preventative character, to effectuate the orders for prevention or abatement; and this involves the jurisdiction to enjoin the commission of a crime which inheres in, or constitutes a part of the nuisance.

COOSAW MINING CO. *v.* SOUTH CAROLINA.

IN THE SUPREME COURT OF THE UNITED STATES, 1891.

[144 *United States* 550.]

This suit was brought by the appellees, March 23, 1891, in one of the courts of South Carolina, and, subsequently, on the petition of the appellant, the defendant below, was removed into the Circuit Court of the United States. 45 Fed. Rep. 804. Its object was to obtain a decree enjoining the Coosaw Mining Company, its servants, agents and employees, from claiming any right, title, interest or grant in or to the phosphate

rock and phosphatic deposits in Coosaw River in that State; from digging, mining or removing such rock and deposits in the bed of that river; and from obstructing by suit or otherwise any agent or other person, acting by authority of the State Board of Phosphate Commissioners, from digging, mining and removing the same.

The grounds of equity jurisdiction in such cases as the one before us are, substantially, those upon which courts of equity interfere in cases of waste, public nuisance and purpresture.[1]

The case of the United States *v.* Gear, 3 How. 120, 121, 123, bears upon this question. The United States, claiming to be the owner of certain lands upon which there was a lead mine, brought an action of trespass *quare clausum fregit* against the party in possession. They also brought a suit in equity for an injunction to stay waste. This court held, in the equity case, that digging ore from lead mines upon the public lands was such waste as entitled the United States to a writ of injunction to restrain it.

These principles are applicable to the present case. The remedy at law for the protection of the State in respect to the phosphate rocks and phosphatic deposits in the beds of its navigable waters is not so efficacious or complete as a perpetual injunction against interference with its rights by digging, mining and removing such rocks and deposits without its consent. The Coosaw Mining Company, unless restrained, will not only appropriate to its use property held in trust for the public, but will prevent the proper administration of that trust, for an indefinite period, by obstructing others, acting under lawful authority, from enjoying rights in respect to that property derived from the State. These conflicting claims cannot be so effectively or conclusively settled by proceedings at law, as by a comprehensive decree covering all the matters in controversy. Proceedings at law or by indictment can only reach past or present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are entitled to have is security for all time against illegal interference with the control by the State of the digging, mining and removing of phosphate rock and phosphatic deposits in the bed of Coosaw River. Such security was properly given by the decree below.[2]

Decree affirmed.

[1] A part of the opinion discussing other cases is omitted.

[2] In Georgetown *v.* Alexandria Canal Co., 1838, 12 Pet. 96, 97, Mr. Justice BARBOUR said:

"It is unnecessary, however, to prosecute this inquiry, because there is a view of the subject which we think decisive of the case. Were it even admitted that the canal company had exceeded the authority under which they are acting, nevertheless, as the Potomac River is a navigable stream, a part of the *jus publicum*, any obstruction to its navigation would, upon the most established principles, be what is declared by law to be a public nuisance. A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is by indictment or information, by which the nuisance may be abated,

STATE *v.* OHIO OIL CO. (1897) 150 Ind. 21. MCCABE, J.—The substance of the complaint is, that for many years heretofore there has been underlying Madison, Grant, Howard, Delaware, Blackford, Tipton, Hamilton, Wells and other counties in Indiana a large deposit of natural gas, utilized for fuel and light by the people of those counties and of many other counties and cities in Indiana, including Indianapolis, Ft. Wayne, Richmond, Logansport, Lafayette and others of the most populous cities of the State, to which cities the gas is conducted, after being brought through wells to the surface of the ground, by pipes and conduits, by means of which many hundreds of thousands of the people of Indiana are supplied with gas for light and fuel. The natural gas underlying the counties named, and other portions of Indiana, is contained in and percolates freely through a stratum of rock known as "Trenton Rock," comprising a vast reservoir in which the gas is confined under great pressure, and from which it escapes, when permitted to do so, with great force. The fuel supplied by the natural gas thus obtained is the cheapest and best known to civilization, and the value of the natural gas deposit to the State and its citizens is many millions of dollars. Since the discovery of the gas deposit in 1886, vast sums of money have come into the State and have been invested in building up large manufacturing interests, and vast sums of money belonging to the people of Indiana have been invested in similar enterprises, causing a great increase of population, principally in the territory underlying which gas is found.

Natural gas exists in large reservoirs, or a series of reservoirs connected with each other, underlying the gas territory, and the diminution or consumption of natural gas taken from any part of them affects or reduces correspondingly the common supply. If the gas supply is accordingly husbanded and protected it will last for many years, and continue to supply the various interests named with abundant fuel, and the population, wealth, and other material interests of the State will continue to be benefited and enhanced, and the comfort, enjoyment, and happiness of the people of the State greatly increased.

It is next contended that there is no authority or right of action in the State at common law, and especially that the State cannot maintain a suit in equity, either under the statute or at common law. This being a suit in equity, as the law existed prior to the adoption of the civil code of 1852, if the objection last mentioned be well taken, it is fatal to the complaint. The reason assigned in argument why the State cannot main-

and the person who caused it may be punished. If any particular individual shall have sustained special damage from the erection of it, he may maintain a private action for such special damage, because to that extent he has suffered beyond his portion of injury in common with the community at large. 5 Bac. Abr. Nuisance, B. p. 51; 2 Ld. Raym. 1163."

And see for Federal and State cases following the principal case 12 Rose, Notes on U. S. Reports 185-186.

tain the action for an injunction is that the statute provides a different remedy, namely, the recovery of a penalty of $200.00 for each violation of the act, and a further penalty of $200.00 for each ten days during which such violation shall continue, to be recovered in a civil action in the name of the State, for the use of the county in which such well is located, with attorney's fees and costs of suit. And another remedy provided in another section of the act is that certain persons in the vicinity are authorized to go upon the land where any well is situate from which gas or oil is allowed to escape in violation of the act, and shut up the same, and pack and tube said well so as to prevent the escape of gas or oil, and maintain a civil suit against the owner for the costs of such closing of said well, with attorney's fees and costs of suit. But this court has gone much further than to hold that the fact that the civil remedy given to recover penalties and the other remedies for violation of the act, does not bar the right to an injunction. In the case of the Peoples Gas Co. *v.* Tyner, *supra,* it was said: "No authority has been cited, and we know of none, supporting the position of the appellants that the appellee is not entitled to an injunction because the accumulation of nitroglycerine within the corporate limits of a town or city is a crime. It has long been settled that a private citizen may maintain an action for a public wrong if he suffers an injury peculiar to himself and not sustained by the public in general." In that case it was held that the extraordinary equitable remedy by injunction could be invoked by a private citizen, even though the act to be enjoined was made a crime by statute.

The supreme court of Kansas, in State *v.* Crawford, 28 Kansas, 726, said: "Every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated, is a public nuisance." The demurrer to the complaint admits that the wells of the appellee are in this category.

Appellee's counsel have conceded that the pressure in gas wells since the discovery of gas in this State has fallen from 350 pounds to 150 pounds. This very strongly indicates the possibility, if not the probability, of exhaustion. In the light of these facts, one who recklessly, defiantly, persistently, and continuously wastes natural gas, and boldly declares his purpose to continue to do so, as the complaint charges appellee with doing, all of which it admits to be true by its demurrer, ought not to complain of being branded as the enemy of mankind. But appellee tries to excuse its conduct on the score that it cannot mine and utilize oil under and in its land without wasting the gas. But there is nothing in the record to bear out that claim. However, if there was, it would not furnish a valid excuse. It is not the use of unlimited quantities of gas that is prohibited, but it is the waste of it that is forbidden. The object and policy of that inhibition is to prevent, if possible, the exhaustion of the storehouse of nature, wherein is deposited an element that ministers more to the comfort, happiness, and well-being of society than any other of the bounties of the earth. Even if the appellee cannot draw

oil from its well without wasting gas, it is not denied that it may draw gas therefrom, and utilize it without wasting the oil. But, even if it cannot draw oil from such wells without wasting gas, and is forbidden by injunction so to do, it is only applying the doctrine that the owner must so use his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the State, whose many *quasi* public corporations have many millions of dollars invested in supplying gas to the State and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's wells as they have been doing, they injure thousands and perhaps millions of the people of Indiana, and the injury, the exhaustion of natural gas, is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of very small consequence as compared with that calamity which it mercilessly and cruelly holds over the heads of the people of Indiana, and, in effect, says: "It is my property, to do as I please with, even to the destruction of one of the greatest interests the State has, and you people of Indiana help yourselves if you can. What are you going to do about it?"

We had petroleum oil for more than a third of a century before its discovery in this State, imported from other States, and we could continue to do so if the production of oil should cease in this State. But we cannot have the blessings of natural gas unless the measures for the preservation thereof in this State are enforced against the lawless. We therefore conclude that the facts stated in the complaint make a case of a public nuisance which the appellant has a right to have abated by injunction, and that the complaint states facts sufficient to constitute a cause of action. Hence, the circuit court erred in sustaining appellee's demurrer to the complaint. The judgment is reversed, and the cause remanded, with instructions to overrule said demurrer, and require the defendant to answer the complaint, and for further proceedings in accordance with this opinion.

CORNING AND OTHERS *v.* LOWERRE.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1822.

[6 *Johnson's Chancery,* 439.]

Bill for an injunction to restrain the defendant from obstructing Vestry street, in the City of New York, and averring that he was building a house upon that street, to the great injury of the plaintiff, as owners of lots on and adjoining that street, and that Vestry street has been laid out, regulated, and paved, for about twenty years.

The Chancellor distinguished this case from that of the Attorney-General *v.* The Utica Insurance Company, 2 Johns. Ch. Rep. 371, inasmuch as here was a special grievance to the plaintiffs, affecting the enjoyment of their property, and the value of it. The obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs.

Injunction granted.[1]

[1] In Georgetown *v.* Alexandria Canal Co., 1838, 12 Peters, 91, 98, Mr. Justice BARBOUR, speaking for a unanimous court, said:

"Besides this remedy at law, it is now settled that a court of equity may take jurisdiction in cases of public nuisance by an information filed by the Attorney-General. This jurisdiction seems to have been acted on with great caution and hesitancy. Thus, it is said by the Chancellor in 18 Ves. 217 that the instances of the interposition of the court were confined and rare. He referred, as to the principal authority on the subject, to what had been done in the court of exchequer upon the discussion of the right of the Attorney-General, by some species of information, to seek on the equitable side of the court relief as to nuisance and preventive relief. Chancellor KENT in 2 Johns. Ch. 382 remarks that the equity jurisdiction in cases of public nuisance, in the only cases in which it had been exercised—that is, in cases of encroachment on the King's soil—had lain dormant for a century and a half; that is, from Charles I. down to the year 1795. Yet the jurisdiction has been finally sustained, upon the principle that equity can give more adequate and complete relief than can be obtained at law. Whilst, therefore, it is admitted by all that it is confessedly one of delicacy, and accordingly the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent danger of irreparable mischief before the tardiness of the law could reach it.

"The court of equity, also, pursuing the analogy of the law that a party may maintain a private action for special damage, even in case of a public nuisance, will now take jurisdiction in case of a public nuisance at the instance of a private person where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy. Amongst other cases, this doctrine is laid down in the case of Crowder *v.* Tinkler, 19 Ves. 616. In that case, page 622, the Chancellor says: 'Upon the question of jurisdiction, if the

DEMPSIE *v.* DARLING ET AL.

IN THE SUPREME COURT OF WASHINGTON, 1905.

[81 *Pacific Reporter* 152.]

DUNBAR, J. The complaint in this case alleged, in substance, that the appellant owns a parcel of vacant ground in the City of Spokane; that contiguous to this ground is a house and lot owned by the respondent, Philadelphia Securities Company; that the house has three stories; that the respondent Philadelphia Securities Company for a long time has been and is renting the second and third stories of the house to respondent F. L. O. Darling as and for a house of ill-fame, and for the purpose of enabling her, as proprietress, to conduct a house of prostitution therein, and to enable her to have and harbor therein prostitutes and lewd and abandoned women for the purposes of prostitution; that pursuant to said purpose the said respondent F. L. O. Darling has been and is conducting a house of prostitution in the second and third stories of said house, and that prostitution has been and is practiced in the second and third stories by the said proprietress and the other respondents, who are lewd and abandoned women, and reside therein; that it is the wish and purpose of appellant to build at once upon his said vacant ground a

subject was represented as a mere public nuisance, I could not interfere in this case, as the Attorney-General is not a party; and if he was a party, upon the dicta, unless it was clearly a public nuisance generally, the court would not interpose by injunction until it had been tried at law. The complaint is, therefore, to be considered as of not a public nuisance simply; but what, being so in its nature, is attended with extreme probability of irreparable injury to the property of the plaintiffs, including, also, danger to their existence; and on such a case, clearly established, I do not hesitate to say an injunction would be granted.' The principle is also distinctly asserted and acted on by Chancellor KENT in the case of Corning *v.* Lowerre, 6 Johns. Ch. 439. In that case a bill was filed for an injunction to restrain the defendant from obstructing Vestry street, in the City of New York, and averring that he was building a house upon that street, to the great injury of the plaintiffs, as owners of lots on and adjoining that street; and that Vestry street had been laid out, regulated and paved for about twenty years. The injunction was granted. The Chancellor said that here was a special grievance to the plaintiffs affecting the enjoyment of their property and the value of it. The obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs. The principle, then, is, that in case of a public nuisance, where a bill is filed by a private person asking for relief by way of prevention, the plaintiff cannot maintain a stand in a court of equity unless he avers and proves some special injury."

For the cases in the Federal and State courts of like holding, see note to the case last cited in 3 Rose, Notes on United States Reports, pp. 709-712.

house, to be by him devoted to and occupied for some respectable and lawful purpose; that, by reason of the conducting of a house of prostitution in the aforesaid second and third stories of said house, and the presence of prostitutes therein, any house which appellant might build upon his ground would be undesirable for any lawful use, and he could not occupy it or rent it for any lawful purpose; and that, by reason of the facts above stated, his ground is being continuously and irreparably damaged by diminution in value; and an injunction was prayed for. The respondents interposed a demurrer to the effect that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the appellant having refused to plead further, a final judgment of dismissal of the action was rendered in favor of respondents, from which judgment this appeal is taken.

We think the court erred in sustaining the demurrer in this complaint. It is contended by the respondents, in sustentation of the action of the court, that inasmuch as the plaintiff's lot was a vacant lot, and a house had not already been built upon it which would be affected by the nuisance complained of, the damages are therefore too remote and speculative; that the plaintiff has not yet built upon said lot; and that he may never do so. But the allegation of the complaint is to the effect that it is the purpose of the plaintiff to build at once upon this lot a house for the purpose of lease or rent for some reputable and lawful purpose; and it would seem unreasonable to compel the plaintiff to wait until he had been to the expense of constructing a house, and advertising the same for rent for a reasonable time, before applying to the courts for a remedy which would necessarily, in the natural process of litigation, be delayed for a considerable length of time, thereby depriving him of a right to which he is entitled, viz., to enjoy the use of his property without hindrance through the operation of a nuisance. It may be conceded at the outset that, when a party seeks the aid of a court of equity by injunction, he must show not only a clear legal or equitable right, but also a well-grounded apprehension of immediate injury to his rights, and that, where no necessity is shown for the injunction as a means of protection to such rights, it should not be granted. But it seems to us that the immediate injury is sufficiently set forth in the complaint under consideration.

The case of Dana *v.* Valentine, 5 Mete. 8, cited by respondents, and which it is claimed is exactly in point, seems to us not to reach the case under consideration at all. There, it is true, the court used the following language, quoted in respondents' brief, viz.: "Upon no principle of equity can the court interpose in their favor by injunction on the defendant to desist from carrying on his trade; there being no certainty that dwelling houses will ever be erected on these premises, or, if there should be, it is uncertain when such erections may be made. To require this extraordinary relief, the injury complained of must actually exist, or the danger must appear to be certain and immediate, and not depending on any contingency. We think it therefore very manifest that these owners of va-

cant lots have made out no title to the interposition of a court of equity." An examination of that case, however, reveals the fact that that action was brought against the defendant both by the owners of vacant lots and by the owners of buildings adjacent to the alleged nuisance, which was the business of manufacturing soap and candles and of slaughtering cattle, and the injunction was denied on two grounds, viz.: First, that the plaintiffs, if they had been injured, had a complete and adequate remedy at law; and, second, that the defendant had made out a good prescriptive right and justification. So that in any event the complaint of the parties who owned the vacant lots would have failed under the general ruling of the court on the two propositions just above mentioned, and what was said in relation to them was purely without the case. But in any event their right to relief was denied specially upon the ground that they had a complete and adequate remedy at law, and that an action at law for the recovery of damages for the diminution of the value of their lands by the nuisance alleged was available to them; there being no certainty that any dwelling houses would ever be erected upon the premises, or, if they should be, when such erections would be made, and that equity would not reach beyond these contingencies to afford relief. But as we have before noticed, so far as the certainty of the building is concerned, and also the certainty of the time, the allegation of the complaint, which must be taken to state the truth, is to the effect that the building will be erected at once. And as to the second proposition there decidedly the court, that an action for damages was the only resort of the plaintiffs, the owners of vacant lots, that question was decided adversely to the respondents' contention by this court in Ingersoll *v.* Rousseau, 35 Wash. 92, 76 Pac. 513, where it was held that injunction lies to abate the maintenance of a bawdy house as a public nuisance specially injurious to plaintiff's adjoining property, used for residence purposes—the common-law remedies of indictment and action on the case being inadequate—and that this rule has not been changed by statute in this State. The above conclusion was reached after a lengthy and evidently painstaking investigation of the law and an investigation of the authorities, ancient and modern, on this subject, and puts at rest the contention made by the respondents that the remedy by injunction was not open to the plaintiff in this case if the petition in other respects stated a cause of action.

The respondents also cite 1 High on Injunctions, 774, where it is said by that author: "To justify a court of equity in enjoining a nuisance of the class under consideration, the person aggrieved must show to the court some actual, substantial damage, and not merely a remote, contingent, or prospective injury." But the preceding section discloses the class under consideration. The author there was discussing injunctions which were asked for against the operation of legitimate businesses, such as the burning of brick, the erection of a chandlery or of slaughter houses, or of livery stables, or the operation of limekilns or gas works—busi-

nesses that were in themselves lawful enterprises, which the government is anxious to foster under proper regulations and locations. But the nuisance complained of in this case is of an entirely different character. It is degrading, immoral, indecent, and always under the ban of the law, and courts ought not to be too exacting with citizens who are asking relief from such impositions upon their rights. An examination of the other cases cited by respondents shows that they are not applicable to the facts stated in this complaint, as construed by the decision of this court in Ingersoll *v.* Rousseau, *supra.*

The judgment will be reversed, with instructions to overrule the demurrer to the complaint.[1]

MOUNT, C. J., and ROOT, CREW, HADLEY, FULLERTON and RUDKIN, J.J., concur.

HARNISS ET AL. *v.* BULPITT.

COURT OF APPEAL, SECOND DISTRICT, CALIFORNIA, 1905.

[81 *Pacific Reporter,* 1022.]

ALLEN, J. This is an action for damages and to procure an order for the abatement of a nuisance alleged to exist by reason of obstruction by fences at both ends of a public alley in the town of Bishop, Inyo County, this State, upon which alley plaintiffs' property abuts, by which

[1] The following comment on the principal case was made in 6 Columbia Law Review, p. 56:

"Since Hamilton *v.* Whittridge, 1857, 11 Md. 128, the courts have generally granted injunctions restraining the maintenance of such nuisances, though the question seems always to have arisen between owners of adjoining occupied houses. Blagden *v.* Smith, 1899, 34 Or. 394; Crawford *v.* Tyrrell, 1904, 128 N. Y. 341; Weakley *v.* Page, 1899, 102 Tenn. 178; Marson *v.* French, 1884, 61 Tex. 173; *contra,* Neaf *v.* Palmer, 1898, 103 Ky. 496; Anderson *v.* Doty, 1884, 33 Hun. 160. And the fact that land is unoccupied should not cut off relief, occupancy affecting merely the extent, not the right of recovery. Ruckman *v.* Green, N. Y., 1876, 9 Hun 225; Busch *v.* Railroad Co., 1890, 12 N. Y. Supp. 85; but see Dana *v.* Valentine, Mass., 1842, 5 Met. 8. The courts denying the relief seem not to have distinguished between what must be shown to constitute a nuisance and what is necessary to constitute special damages, the fact of the nuisance being established. In this latter situation, mere diminution in value is sufficient special damage on which to base an injunction. High, Injunctions, § 785; and see Harrison *v.* Good, 1871, L. R. 11 Eq. 338. In the principal case, the maintenance of a bawdy house being a nuisance *per se,* Wood, Nuisance, § 29, and the allegation of reduced value constituting the necessary special damages being admitted by the demurrer, the court properly holds that the complaint states a case for injunction."

plaintiffs are deprived of the free use of their property, and from going from their property out upon said alley, or through the same to Church street, a public street in said town. The damages were claimed on account of the depreciation in value and by reason of being deprived of the use of said alley. To the complaint a demurrer was interposed upon the grounds, first, that plaintiffs had no legal capacity to sue; and, second, that the complaint did not state facts sufficient to constitute a cause of action. The demurrer being overruled, defendant answered, denying all the material averments of the complaint other than the construction of the fences at the places designated in the complaint. The defendant further alleges that the strip of ground denominated a public alley in plaintiffs' complaint was not an alley, but the private property of defendant. Findings and judgment went for plaintiffs, and a decree was entered enjoining the defendant from maintaining such fences or obstructing said alley. From the judgment defendant appeals.

There being nothing apparent upon the face of the complaint as indicating plaintiffs' want of capacity to sue, the demurrer upon that ground was properly overruled. The principal contention of defendant presented in his points and authorities is that the complaint does not state a cause of action, because no injury is alleged different in kind from that sustained by the public at large. The nuisance complained of, being the obstruction of a public alley, is a public one. That plaintiff may have redress in a private action, it must appear by proper averment that the plaintiff will suffer some injury therefrom in its nature special and peculiar to him, and different in kind from that to which the public is subjected. Civ. Code, § 3493; Siskiyou Lumber Co. *v.* Rostel, 121 Cal. 513, 53 Pac. 1118. Applying this test to the complaint, we regard it as sufficient. The allegations that ingress and egress to and from the abutting property owned by plaintiffs upon or through the alley is prevented by the obstruction is an allegation of an injury to a private right incidental to private property. The owner of property abutting upon a street or alley owns the incidental rights to ingress and egress as completely as he does the property to which the rights are an incident. Brown *v.* Board of Supervisors, 124 Cal. 280, 57 Pac. 82. An infringement upon these rights is, therefore, a private wrong. "When the alleged nuisance would constitute a private wrong by injuring property or creating personal inconvenience and annoyance for which an action might be maintained in favor of the party injured, the same is none the less actionable because the wrong is committed in a manner which would render the party liable to indictment for a common nuisance." Wesson *v.* Washburn Printing Co., 13 Allen, 95, 90 Am. Dec. 181; Lind *v.* City of San Luis Obispo, 109 Cal. 344, 42 Pac. 437.

Appellant's final contention is that the complaint alleging that the strip of ground was a public alley, and had been so used for twenty-five years as a means of ingress and egress to and from plaintiffs' property, was an insufficient statement of fact, in that the manner in which it be-

came such alley was not averred; and the finding was challenged in the same regard. There is no merit in this contention. The allegation was sufficient, and the findings support the judgment.

Judgment affirmed.

We concur: GRAY, P. J.; SMITH, J.

GARDNER *v.* THE TRUSTEES OF THE VILLAGE OF NEWBURGH.

IN THE COURT OF CHANCERY OF NEW YORK, 1816.

[2 *Johnson's Chancery* 162.]

The bill, which was for an injunction, stated, that the plaintiff is owner of a farm in the village of Newburgh, through which a stream of water has, from time immemorial, run, having its source from a spring in the adjoining farm of the defendant, Hasbrouck, and after entering the plaintiff's land, continues its whole course through his farm until it empties into the Hudson River. That this stream greatly fertilizes his fields, and, running near his house, serves for watering his cattle, and for various domestic and economical purposes. That it supplies water to a brick-yard on the farm of the plaintiff where most of the bricks used in Newburgh are made; it also supplies a large distillery erected by him at great expense, and a churning-mill, and water for a mill-seat, where the plaintiff is about to erect a mill for grinding plaster of paris. That the trustees of the village of Newburgh, the defendants, by false representations, obtained an act of the Legislature, passed the 27th of March, 1809, to enable the said trustees to supply the inhabitants of the village with pure and wholesome water. That the trustees applied to the plaintiff for leave to divert the stream, offering him a trifling and very inadequate compensation, which he refused. That the said trustees, having obtained leave from the defendant, Hasbrouck, the owner of the stream, to use and divert the water, or a part thereof, that is, a stream one inch and a quarter in diameter, taken from a great elevation, have commenced a conduit, and threaten to divert the stream, or a great part thereof, from the plaintiff's farm. That the plaintiff is apprehensive that if this is done, there will not, in a dry season, be water sufficient even for his cattle, etc. The plaintiff, therefore, prayed an injunction to prevent the defendants from diverting the water, etc. The bill was sworn to, and the plaintiff produced several affidavits, which stated that the stream was not more than sufficient for the distillery, brick-yard, etc., of the plaintiff, and if diverted through a pipe, or tube, of the pro-

posed diameter, would greatly injure, if not render the works useless. One of the affidavits stated, that the whole stream would pass through a tube of one inch diameter, with a head of five feet.

The Chancellor [JAMES KENT.]—The statute under which the trustees of the village of Newburgh are proceeding, Sess. 32, ch. 119, makes adequate provision for the party injured by the laying of the conduits through his land, and also affords security to the owner of the spring, or springs, from whence the water is to be taken. But there is no provision for making compensation to the plaintiff, through whose land the water issuing from the spring has been accustomed to flow. The bill charges, that the trustees are preparing to divert from the plaintiff's land, the whole, or the most part of the stream, for the purpose of supplying the village. The plaintiff's right to the use of the water is as valid in law, and as useful to him as the rights of others who are indemnified or protected by the statute; and he ought not to be deprived of it, and we cannot suppose it was intended he should be deprived of it, without his consent, or without making him a just compensation. The act is, unintentionally, defective, in not providing for his case, and it ought not to be enforced, and it was not intended to be enforced, until such provision should be made.

It is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, and the law gives him ample remedy for the violation of this right. To divert or obstruct a watercourse is a private nuisance; and the books are full of cases and decisions asserting the right and affording the remedy, F. N. B. 184; Moore *v.* Browne, Dyer 319 b; Lutterel's case, 4 Co. 86; Glynne *v.* Nichols, Comb. 43, 2 Show. 507; Prickman *v.* Trip, Comb. 231.

The court of chancery has also a concurrent jurisdiction, by injunction, equally clear and well established in these cases of private nuisance. Without noticing nuisances arising from other causes, we have many cases of the application of equity powers on this very subject of diverting streams. In Finch *v.* Resbridger, 2 Vern. 390, the Lord Keeper held, that after a long enjoyment of a watercourse running to a house and garden, through the ground of another, a right was to be presumed, unless disproved by the other side, and the plaintiff was quieted in his enjoyment, by injunction. So, again, in Bush *v.* Western, Prec. in Ch. 530, a plaintiff who had been in possession, for a long time, of a watercourse, was quieted by injunction, against the interruption of the defendant, who had diverted it, though the plaintiff had not established his right at law, and the court said such bills were usual. These cases show the ancient and established jurisdiction of this court; and the foundation of that jurisdiction is the necessity of a preventive remedy when great and immediate mischief, or material injury would arise to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and

an injurious interruption of that right which, upon just and equitable grounds, ought to be prevented. Anon. 1 Vern. 120; East India Company *v.* Sandys, 1 Vern. 127; Hills *v.* University of Oxford, 1 Vern. 275; Anon. 1 Vesey 476; Anon. 2 Vesey 414; Whitchurch *v.* Hide, 2 Atk. 391; 2 Vesey 453; Attorney-General *v.* Nichol, 16 Vesey 338.

In the application of the general doctrines of the court to this case, it appears to me to be proper and necessary that the preventive remedy be applied. There is no need, from what at present appears, of sending the plaintiff to law to have his title first established. His right to the use of the stream is one which has been immemorially enjoyed, and of which he is now in the actual possession. The trustees set up no other right to the stream (assuming, for the present, the charges in the bill), than what is derived from the authority of the statute; and if they are suffered to proceed and divert the stream, or the most essential part of it, the plaintiff would receive immediate and great injury, by the suspension of all those works on his land which are set in operation by the water. In addition to this, he will lose the comfort and use of the stream for farming and domestic purposes; and, besides, it must be painful to any one to be deprived, at once, of the enjoyment of a stream which he has been accustomed always to see flowing by the door of his dwelling. A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseised "but by lawful judgment of his peers, or by due process of law." This is an ancient and fundamental maxim of common right to be found in *magna charta,* and which the Legislature has incorporated into an act declaratory of the rights of the citizens of this State.

I shall, accordingly, upon the facts charged in the bill, and supported by affidavits, as a measure immediately necessary to prevent impending injury, allow the injunction, and wait for the answer, to see whether the merits of the case will be varied.

Injunction granted.[1]

[1] "The right of the riparian owner to have the stream flow by his land in its natural condition extends to the quality as well as the quantity of the water, and an upper proprietor has, *prima facie,* no right to so use his land or the water of the stream as to cause pollution of the latter. This right of a lower riparian proprietor to have the water come to him free from pollution is subject, however, to the right of the upper proprietor to make a reasonable use of the water; and whether a use which affects the purity of the water is reasonable in a particular case is, like the question as to excessive use, one of fact, to be determined by a consideration of the character and ordinary use of the stream, the extent of the pollution, its necessity for the purpose of making a beneficial use of the water, and the resulting injury to lower proprietors." 1 Tiffany, Real Property, § 297.

In the footnote to the paragraph quoted the student will find cited the leading authorities, which amply support the text.

SWAINE *v.* THE GREAT NORTHERN RAILWAY COMPANY.

IN CHANCERY, 1864.

[4 *De Gex, Jones and Smith* 211.]

This was an appeal by the plaintiff from the dismissal of his bill with costs by his Honor the Vice-Chancellor WOOD.

The case made by the bill was in substance as follows:

The plaintiff owned a house on land adjoining certain premises on which the defendant railway maintained a siding. The defendants had formerly used the siding for discharging the contents of their wagons and trucks but more recently had used it for discharging large quantities of dung and other manure, together with decomposing animal remains. In some instances this was immediately carried away and so caused no inconvience; at other times the material had been placed in stacks or heaps and allowed to remain so for a considerable time.

The plaintiff alleged that the effluvium arising from the heaps, rendered the enjoyment or occupation of his house impossible, without the greatest discomfort, inconvenience, and danger to health.

The appellant asked for an injunction to restrain the respondents from using the siding, for the deposit of manure in such a manner as to interfere with the quiet and wholesome enjoyment by the appellant of his house and premises.

The appellant, it appeared, had taken no steps to try his right against the respondents at law, nor had he moved in the suit for an interlocutory injunction.

The Lord Justice TURNER:

But upon the facts of this case there are two points—first, whether the appellant is entitled to an injunction; and secondly, whether, if not entitled to an injunction, he is entitled to damages in this court.

I do not understand it to be contended that, if the manure was brought to the station in a proper manner, and was properly dealt with when there, the appellant would have a case for the interference of the court. The case made by the bill and argued at the bar is this: first, that the manure was not proper manure; and secondly, that it was not removed from time to time as often as it ought to have been removed.

Upon the evidence, it cannot be denied that in some instances dead dogs and cats have got into this manure—that occasionally the manure which was carried was not proper manure. Nor can it be denied that in some instances the manure has remained at the station longer than it ought to have remained. The manure is brought down; the farmer does not send for it on the day it arrives. It must be emptied out of the trucks, and deposited in some place or other.

But the real question is, whether there has been such a continued

system of carrying manure of a description not proper to be carried, and therefore prejudicial to the appellant, and such a continued system of keeping manure at the station beyond the time necessary or proper for disposing of it, as to induce the court to interfere by injunction.

With reference to this point, and adhering to the opinion expressed by both Lord CRANWORTH and myself in the case of The Attorney-General *v.* The Sheffield Gas Company, 1853, 3 De G. M. & G. 304, that it is not in every case of nuisance that the court will interfere by injunction; and holding that occurrences of nuisances, if temporary and occasional only, are not grounds for the interference of this court by injunction, except in extreme cases. There is not in my judgment here a sufficient case for interference.

The Lord Justice KNIGHT BRUCE. I agree.

LAMBTON *v.* MELLISH.
LAMBTON *v.* COX.

IN THE SUPREME COURT OF JUDICATURE. CHANCERY DIVISION, 1894.

[*Law Reports* [1894] 3 *Chancery,* 163.]

The plaintiff was the lessee and occupier of a house adjoining Ashstead Common in Surrey. The premises of the defendant Mellish were about 60 or 70 yards from the plaintiff's premises, and those of the defendant Cox were about 120 or 130 yards from the plaintiff's premises and about 100 yards from those of the defendant Mellish, and were separated from both by a line of railway.

It appeared that during the summer months a large number of school treats and assemblages of that description took place on Ashstead Common.

The defendants Mellish and Cox were rival refreshment contractors who catered for visitors and excursionists to the common, and both the defendants had merry-go-rounds on their premises, and were in the habit of using organs as an accompaniment to the amusements.

It appeared from the evidence that these organs were for three months or more in the summer continuously being played together from 10 or 11 A.M. till 6 or 7 P.M., and that the noise caused by the two organs was "maddening."

The organs used by Mellish had been changed, and it was alleged by him that the organ in use when the motion was made was a small portable hand organ making comparatively little noise. That used by Cox was a much larger one provided with trumpet stops and emitting sounds which could be heard at the distance of one mile.

The plaintiff now moved against the defendant in each action for an

injunction restraining him from playing any organs so as to cause a nuisance or injury to the plaintiff or his family, or other the occupiers of the plaintiff's property.

CHITTY, J. Notwithstanding the conflict of evidence, I am of opinion that the plaintiff is entitled to the injunction he asks for as against the defendant in each action.

A man may tolerate a nuisance for a short period. A passerby or a bystander would not find any nuisance in these organs; but the case is very different when the noise has to be continuously endured: under such circumstances it is scarcely an exaggeration to term it "maddening," going on, as it does, hour after hour, day after day, and month after month. I consider that the noise made by each defendant, taken separately, amounts to a nuisance. But I go further. It was said for the defendant Mellish that two rights cannot make a wrong—by that it was meant that if one man makes a noise not of a kind, duration, or degree sufficient to constitute a nuisance, and another man, not acting in concert with the first, makes a similar noise at the same time, each is responsible only for the noise made by himself, and not also for that made by the other. If the two agreed and acted in combination each would be a wrongdoer. If a man shouts outside a house for most of the day, and another man, who is his rival (for it is to be remembered that these defendants are rivals) does the same, has the inhabitant of the house no remedy? It is said that that is only so much the worse for the inhabitant. On the ground of common sense it must be the other way. Each of the men is making a noise and each is adding his quantum until the whole constitutes a nuisance. Each hears the other, and is adding to the sum which makes up the nuisance. In my opinion each is separately liable, and I think it would be contrary to good sense, and, indeed, contrary to law, to hold otherwise. It would be contrary to common sense that the inhabitants of the house should be left without remedy at law. I think the point falls within the principle laid down by Lord Justice JAMES in Thorpe *v.* Brumfitt, 1873, L. R. 8 Ch. 13, p. 50. That was a case of obstructing a right of way, but such obstruction was a nuisance in the old phraseology of the law. He says: "Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person

among the hundred to say that what he does causes of itself no damage to the complainant." There is in my opinion no distinction in these respects between the case of a right of way and the case, such as this is, of a nuisance by noise. If the acts of two persons, each being aware of what the other is doing, amount in the aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint. The defendants here are both responsible for the noise as a whole so far as it constitutes a nuisance affecting the plaintiff, and each must be restrained in respect of his own share in making the noise. I therefore grant an interim injunction in both the actions in the terms of the notices of motion.[1]

RUSHMER *v.* POLSUE & ALFIERI.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION, 1906.

[*Law Reports* (1906) 1 *Chancery* 234.]

Appeal from the judgment of Warrington J. granting a perpetual injunction to restrain a nuisance arising from noise.

The facts of the case, as shown by the evidence, were as follows:—

The plaintiff was a dairyman, living and carrying on his business at No. 8 Gough Square, Fleet Street, in the City of London,—a district specially devoted to printing and allied trades. Although a large printing establishment directly opposite was operated, at certain seasons of the year at night, as was also, at all times, the printing works of a daily newspaper a little further away, it was shown that no disturbance or inconvenience resulted from either of these. The defendants, owners of an adjoining house (separated by a party wall), previously used for printing purposes, but operated during the day only, set up a printing press which later they began to operate at night. The press itself was of an improved kind, quieter, it was said, than most machines of its kind. It had always been carefully and properly worked. When first set up it was driven through the medium of a shafting fixed to the ceiling of the room; but after a complaint by the plaintiff this was altered and the machine was driven by a belt passing directly to it from the motor. Later the plaintiff again complained, and caused a formal letter of complaint to be

[1] "Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant." Per Sir W. M. JAMES in Thorpe *v.* Brumfitt, 1871, L. R. 8 Ch. App. 650, 656.

written by his solicitor. No reply being made, the plaintiff issued the writ in this action against the defendants for an injunction to restrain them from so working their machinery and carrying on their printing works, as, by reason of noise or otherwise, to cause a nuisance or annoyance to the plaintiff as lessee and occupier of the house, No. 8, Gough Square, or to his family, or to the persons inhabiting or resorting to that house.

In their defence to the plaintiff's statement of claim, the defendants denied that their printing machine was being so worked as to cause a nuisance to the plaintiff, and they insisted that, as his premises were situated in the heart of a district almost entirely devoted to the printing and allied trades, he was not entitled to an injunction. At the conclusion of the trial, before WARRINGTON J., he delivered his judgment, in which he commenced with the following statement of the legal principles which, in his opinion, were applicable to the case:—"The question I have to answer is whether the defendants, by working the machine in question, seriously interfere with the comfort, physically, of the plaintiff and his family in the occupation of his house according to the ordinary notions prevalent among reasonable English men and women: Walter *v.* Selfe, 4 De G. & Sm. 315, 322; and for the purpose of answering this question I am not to look at the defendants' operations in the abstract and by themselves, but in connection with all the circumstances of the locality, and in particular in reference to the nature of the trades usually carried on there, and the noises and disturbance existing prior to the commencement of the defendants' operations: Sturges *v.* Bridgman, 11 Ch. D. 852, 865; St. Helen's Smelting Co. *v.* Tipping, 11 H. L. C. 642. But if, after taking these circumstances into consideration, I find a serious and not merely a slight additional interference with the plaintiff's comfort as above defined, I think it is the duty of the Court to interfere: Crump *v.* Lambert, L. R. 3 Eq. 409. This seems to me to be the true result of the authorities." His Lordship then proceeded to deal with the evidence, and stated the three following definite findings of fact:—First, that although in the day time the plaintiff must have been subject to some noise from printing works in the immediate neighbourhood, no disturbance at night had been caused by noise arising from any of those sources. Secondly, that as regarded the ordinary working hours in the daytime, the plaintiff had not proved such a substantial addition to pre-existing noises as would amount to a legal nuisance. And, thirdly, that the night working of the defendants' machine caused a serious disturbance to the plaintiff and his family such as had not previously been experienced by them; and his Lordship held that to be a legal nuisance entitling the plaintiff to an injunction. Accordingly he granted a perpetual injunction restraining the defendants, their workmen, servants and agents from so working their machinery and so carrying on their printing works at No. 10, Wine Office Court, as by reason of noise to cause a nuisance to the plaintiff as

lessee and occupier of the adjoining house, No. 8, Gough Square, or to his family, or to the persons inhabiting or resorting to such house.[1]

VAUGHAN WILLIAMS L.J., after shortly stating the object of the action and the nature of the evidence, and reading the principles stated by WARRINGTON J., in the portion of his judgment above quoted, as being applicable to the case, proceeded:—[2]

It was urged upon us by counsel for the defendants, that, if one takes these findings of the judge in conjunction with the finding at the end of his judgment—namely that, as a fact, the night work caused serious disturbance to the plaintiff and his family, and that such disturbance had not been previously experienced by them—it becomes apparent that, although the learned judge referred to the principles laid down in Walter *v.* Selfe, 4 De G. & Sm. 315, 322; Sturges *v.* Bridgman, 11 Ch. D. 852, 865; St. Helen's Smelting Co. *v.* Tipping, 11 H. L. C. 642, and Crump *v.* Lambert, L. R. 3 Eq. 409, as the principles governing the present case, and that although the passages referred to, taken by themselves, may not be inconsistent with the judgment in this case, yet, if those cases are examined, it would seem that the learned judge has not applied the principles established by them, and that this especially appears to be so if the findings at the end of the judgment in this case are read in connection with the evidence, and that if they are not so read those findings are contrary to the evidence. There are, in my opinion, considerable grounds for this conclusion. The findings of the learned judge are quite consistent with the view that the cases above referred to establish the principle that in an action for nuisance not alleged to be a public nuisance the standard of comfort to be applied—when the tribunal dealing with the facts asks itself the question whether the acts done by the defendants constitute a material interference with the ordinary comfort, physically, of human existence—is the same in a district devoted to a trade carried on by traders in a particular and established manner as it would be outside such a district so devoted to a particular trade. To put it in another way, the findings of the learned judge, and his judgment, are consistent with his having taken the view that if a man lives in a district or street where there are numerous printing establishments, and a printing office is opened next door to him which, in a district devoted to the printing trade, is carried on in the particular and established manner of the printing trade of that district, he has ground for complaint and a cause of action for nuisance, because to him individually there may arise serious discomfort from the printing operations carried on next door in a house not previously used as a printing office, or in a house not previously used for night printing. This was the argument, in fact, presented to us by Mr. Terrell as counsel for the plaintiff, who contended that on this view the findings of the learned judge was amply established by the evidence,

[1] The statement of facts has been abridged.

[2] A part only of the opinion is given.

which clearly shewed, in the language of Lord ROMILLY in Crump *v.* Lambert, L. R. 3 Eq. 409, which he cited, that there was a material interference with the ordinary comfort of human existence. I may observe that I do not myself think that Lord ROMILLY meant by his decision to exclude the proposition of law that in a district or street devoted to trade a different standard of comfort should be applied when answering the question whether there has been a material interference with ordinary comfort in such a district from that which would otherwise be applied; for he says, L. R. 3 Eq. 414: "The smoke of the defendants' factory has produced a completely new state of things as regards the plaintiff's house and grounds." I cannot, however, but see that these words are not inconsistent with the contention that, even in a district or street devoted to trade, if a new factory or printing-house is opened, subjecting the occupier of some house in that district or street to an amount of noise interfering materially with human comfort, this is sufficient to constitute an actionable wrong, and that the words are consistent with the law, namely, that the defendant in such a case could not ask to have Lord ROMILLY'S words, "ordinary comfort of human existence," qualified by the addition, "as enjoyed in this district devoted to a particular trade." But if Lord ROMILLY did mean this, it seems to me that his words are plainly inconsistent with these words of Lord WESTBURY in the St. Helen's Case, 11 H. L. C. 642, 650: "If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property." And, further, it seems to me that Lord ROMILLY'S words, if they are to have the above meaning, are also inconsistent with the words of Lord CRANWORTH in the same case, 11 H. L. C. 653, where, speaking of a case tried by him in the County of Durham as a Baron of the Exchequer, he says: "It was proved incontestably that smoke did come and in some degree interfere with a certain person; but I said, 'You must look at it not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person residing in the town of Shields.'"

The view that the standard of what amount of freedom from smoke, smell, and noise a man may reasonably expect will vary with the locality in which he dwells seems to me confirmed by the following passage in

Lord HALSBURY's judgment in Colls *v.* Home and Colonial Stores, A. C. 179, 185: "A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action." The view I have just stated is confirmed also by the judgment of Lord HARDWICKE in Fishmongers' Co. *v.* East India Co., 1752, 1 Dick. 163, cited by Lord MACNAUGHTEN and also by Lord DAVEY. It should also be observed that the present action is an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort, and not upon the ground that the alleged nuisance produces material injury to the plaintiff's property. And Lord WESTBURY, in St. Helen's Smelting Co. *v.* Tipping, 11 H. L. C. 650, draws a distinction between these cases, saying of the case where the thing alleged to be a nuisance is productive merely of personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, that anything that discomposes or injuriously affects the senses or nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly upon the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, and which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. These observations seem peculiarly applicable to the case of a plaintiff who, as in the present case, carries on, in fact, the business of supplying milk to the persons employed in the very trade to which the district is devoted, and who gets compensation for the personal annoyance to which he is subjected when residing, for the convenience of his milk trade, in a district in which there are very few other residents.

My brethren are, I believe, of opinion that the evidence in this case, and in particular the evidence of the expert called by the plaintiff and the evidence with reference to the noise made at night by the printing machines of the *Daily Telegraph* and of Messrs. Pardon, is not of such a character as to justify the conclusion that the learned judge, in his ultimate finding, in fact failed properly to apply the law as laid down in the House of Lords in St. Helen's Smelting Co. *v.* Tipping, 11 H. L. C. 642, and in the Court of Appeal in Sturges *v.* Bridgman, 11 Ch. D. 852, and acted on a view of Lord ROMILLY's decision in Crump *v.* Lambert, L. R. 3 Eq. 409, inconsistent with those decisions. I do not think I ought to differ from this conclusion or inference of fact; and, accepting this conclusion, it would not be right to review the decision in fact of the judge who tried the case and saw and heard the witnesses. I think, however, that I ought to point out that, in my opinion, it would be inconsistent

with the view expressed by Lord WESTBURY in St. Helen's Smelting Co. *v.* Tipping, 11 H. L. C. 650, in the passage I have already read, and also inconsistent with the view expressed by THESIGER, L.J., in Sturges *v.* Bridgman, 11 Ch. D. 852, to hold that the fact that night work caused a serious disturbance to the plaintiff and his family, in a locality devoted to a particular trade carried on by the traders in a particular and established manner, constituted private and actionable wrong. In Sturges *v.* Bridgman, 11 Ch. D. 865, THESIGER L.J. expresses his view thus: "Whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong." Again, I do not think the fact that the noise of the defendants' printing machine was a substantial addition to pre-existing noises would amount to a legal nuisance, if such noise was only the result of carrying on the trade in the district devoted to that trade according to the particular and established manner. So to hold would, in my judgment, be to disregard the standard of comfort which a person living in such a district would have a right to expect, and, in effect, to hold, as Mr. Terrell argued, that the plaintiff in such circumstances would have suffered a private actionable wrong, unless the defendant could establish a prescriptive right, which I much doubt whether he could ever do in respect of a nuisance which he could not prevent, and therefore could not acquiesce in. I do not think, to use the words of Lord WESTBURY, that the plaintiff would have, in such a district, a good cause of action merely "because to himself individually there may arise much discomfort from the trade carried on in" the newly-opened printing office. It may be, however, that WARRINGTON J. did not intend by his judgment anything to the contrary of this, and that he really intended to find that the defendants' trade was not being carried on in the particular and established manner of the printing district, but caused serious disturbance to the plaintiff and his family by making noises in excess of those made by carrying on the trade in the particular and established manner of the trade of the district. I should not myself have arrived at this conclusion on the evidence as it appears from reading the notes, but I agree that this is not a sufficient ground for reviewing the decision of the learned judge if he, in fact, applied the principles established by St. Helen's Smelting Co. *v.* Tipping, 11 H. L. C. 642, and Sturges *v.* Bridgman, 11 Ch. D. 852. In my opinion this appeal should be dismissed.[1]

[1] The concurring opinions of Lord Justices STERLING and COZENS-HARDY are omitted.

HENNESSY *v.* CARMONY, 1892, 50 N. J. EQ. 616.—[The plaintiff owned a house adjoining premises on which the defendant conducted dyeing works. A part of the latter's equipment was two small engines used in driving two rotary cylinders, "whizzers," in which were placed the dyed fabrics for drying, the water being driven out by centrifugal force. The rapid motion of these engines caused vibrations that, owing to a stratum of quicksand under the buildings, more or less seriously affected the plaintiff's house. The plaintiff filed his bill alleging that this vibration constituted a private nuisance.] PITNEY, Vice-Chancellor.

The familiar ground on which the extraordinary power of the court is invoked in such cases is that it is inequitable and unjust that the injured party should be compelled to resort to repeated actions at law to recover damages for his injury, which, after all in this class of cases, are incapable of measurement; and I presume to add the further ground that in this country limiting the injured party to such remedy must result in giving the wrongdoer a power not permitted by our system of constitutional government, viz., to take the injured party's property for his private purposes upon making, from time to time, such compensation as the whims of a jury may give. This ground of equitable action is of itself sufficient in those cases where the injury, though not irreparable, promises to be repeated for an indefinite period, and so is continuous in the sense that it will be persevered in indefinitely. See Ross *v.* Butler, 4 C. E. Gr. 302.

Several matters have at various times and on various occasions been held to stand in the way of granting an injunction in this class of cases. The principal one is what may be called the "*de minimis*"—" balance of injury " and " discretion " doctrine. It has been said, and held on some

See note on this case in 6 Columbia Law Review 458.

"In an action of this kind, a fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured. In densely populated communities the use of property in many ways which are legitimate and proper necessarily affects in greater or less degree the property or persons of others in the vicinity. In such cases the inquiry always is, when rights are called in question, what is reasonable under the circumstances. If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them." Per KNOWLTON, J., in Rogers *v.* Elliott, 1888, 146 Mass. 349, 351.

occasions, that where the injury to the complainant by the continuance of the nuisance is small and the injury to the defendant by its discontinuance is great, the court will consider that circumstance, and if the balance is greatly against the complainant will, in the exercise of a sound discretion, refuse the injunction and leave the complainant to his remedy at law. As instances in which this motion has been advanced in this State may be cited Quackenbush *v.* Van Riper, 2 Gr. Ch. 350; Van Winkle *v.* Curtis, 2 Gr. Ch. 422; Railroad Company *v.* Prudden, 5 E. Gr. 530, in the court of errors and appeals; and in the later case of Demarest *v.* Hardham, 7 Stew. Eq. 469.

Demarest *v.* Hardham was on final hearing, and while some expressions of the learned vice-chancellor there found standing by themselves may seem to hold that the granting an injunction on final hearing as part of the decree rests in the discretion of the chancellor, I think that, taking what was said on that topic as a whole, it does not bear that interpretation.[1]

[1] In Demarest *v.* Hardham, 1881, 34 N. J. Eq. 469, 472, VAN FLEET, V.C., said: "The important question presented by the case is, does the manner in which the defendant conducts his business interfere with or injure the business of the complainants to such an extent as to create a nuisance which it is the duty of a court of equity to enjoin? The defendant's business is not only lawful, but necessary. It is carried on in a part of the City of Newark devoted almost exclusively to manufacturing and business purposes. No objection can therefore be made to it on the ground that its location is not a fit one. It is not necessarily or inherently noxious, offensive or injurious. It should not, therefore, be enjoined except under a stern necessity. The complainants ask that it be absolutely interdicted, their prayer being that the defendant be restrained from further operating his engine and presses. To grant their prayer is to destroy the defendant's business. Power attended with such disastrous consequences should always be exercised sparingly, and with the utmost caution. All doubts should be resolved against its exercise. Attorney-General *v.* Nichol, 16 Ves. 338. Relief by injunction, in such cases, is not a matter of right, but rests in discretion. If the legal right is not clear, or the injury is doubtful, eventual or contingent, equity will give no aid. Richard's App., 57 Pa. St. 105; Rhodes *v.* Dunbar, Id. 274; Huckenstine's App., 70 Pa. St. 102.

"And so, too, the court is bound to compare consequences. If the fact of an actionable nuisance is clearly established, then the court is bound to consider whether a greater injury will not be done by granting an injunction, and thus destroying a citizen's property and taking away from him his means of livelihood, than will result from a refusal, and leaving the injured party to his ordinary legal remedy; and if, on thus contrasting consequences, it appears doubtful whether greater injury will not be done by granting than by withholding the injunction, it is the duty of the court to decline to interfere. Hilton *v.* Earl of Granville, 1 Cr. & Ph. 283. The duty of granting or refusing an injunction is a matter resting in sound discretion. It should never be granted when it will operate oppressively, or contrary to the real justice of the case, or where it is not the fit and appropriate method of redress

With regard to the insignificancy of the injury to the complainant, it seems to me it cannot be taken into account if it be appreciable and such as would clearly entitle him to damages at law. That consideration was urged and overruled, and with it, as I think, the balance of injury and convenience notion above stated by the court of errors and appeals in Higgins *v.* Water Co., 9 Stew. Eq. 538, at p. 541, which is the latest expression by that court on this subject.

This seems to me to settle the rule in this State.

And I desire here for myself to say that I have never been able to see how the question of the right of the complainant to an injunction on final hearing could ever be a matter properly resting in the "discretion" of the chancellor, as I understand the force of that word in that connection. If by "discretion" is here meant that the judge must be discreet, and must act with discretion, and discriminate, and take into consideration and give weight to each circumstance in the case, in accordance with its actual value in a court of equity, then I say that that is just what he must do in every case that comes under his consideration—no more and no less. And that is the sense in which I understand the word he used in Demarest *v.* Hardham. But if the word "discretion" in this connection is used in its secondary sense, and by it is meant that the chancellor has the liberty and power of acting, in finally settling property rights, at his discretion, without the restraint of the legal and equitable rules governing those rights, then I deny such power. It seems to me that the true scope of the exercise of this latter sort of discretion in the judicial field is found in those matters which affect procedure merely, and not the ultimate right.

I have taken the trouble to examine many of the cases which seem to hold more or less the contrary of what I understand to be the rule laid down by the court of errors and appeals in Higgins *v.* Water Company, and find most of them distinguishable. The majority of them are rulings upon preliminary injunctions, where the right was not yet settled, or where the injury was not a continuing one and the remedy at law ample, or, if on final hearing, there was something inequitable in the complainant's conduct or case which would amount to a defence in equity to an action at law.

And of the English cases, it is proper further to observe that some of

under all the circumstances of the case, or when it will or may work fatal injury to the person enjoined.

"The principle to be deduced from the authorities I understand to be this: That an injunction to restrain a lawful business, on the ground that it is so conducted as to render it a nuisance, should never be granted, except the complainant shows an invasion of a clear legal right, resulting in permanent and serious injury, which cannot be adequately redressed by action at law, and that the allowance of the writ will not inflict upon the defendant a more serious injury than the complainant will sustain if the writ is denied and he be left to his ordinary legal remedy."

them gave damages, instead of an injunction, under the authority of the acts of Parliament for that purpose, called Lord CAIRN'S and Sir JOHN ROLT'S acts. The giving of damages for continuing nuisances is quite within the omnipotent power of Parliament, which is competent to take private property for private purposes. In this country, under our constitutional system, as before remarked, that course is forbidden. I think the language of Lord CRANWORTH, quoted by the learned chief justice in Higgins *v.* Water Company, applies with increased force in this country.

While the "balance of injury" notion has found frequent place in many English cases, the later and best considered of them put the rules governing courts of equity in such cases upon their true ground. Clowes *v.* Staffordshire Works, L. R. 8 Ch. App. 125, 142, 143; Wilts *v.* Water Works, L. R. 9 Ch. App. 451; Goodson *v.* Richardson, 9 Ch. App. 221, are examples. This last was a case of an injury to a bare right of property without any actual damage. Defendant had laid a water-main in a public street, the fee of which was in the complainant, and Lord SELBORNE held he was entitled to a mandatory injunction compelling it to remove it.

Another objection taken was, that if the fact that the vibration as felt in this case is due to the presence of an underlying layer of quicksand, then the defendant should not be held responsible for it. I am unable to discover any strength in that position. I do not see how the fact that nature has provided a very convenient medium through which my neighbor may injure my property should be held to give him the right to injure it.

I will advise a decree that the defendant be restrained from so using his machines as to cause the complainant's house to vibrate, and also from allowing the water and spray from the exhaust of his engines to come on to the complainant's lands.[1]

[1] "Is the evil of such a nature as to justify the court in interfering? It is said that the defendants are about to tear up the streets to an extent, on one side represented as 70 miles, on the other as 100 miles. Take it that 100 miles of the streets are to be torn up. It may be that before the defendants complete their works they will have taken up the pavement over 100 miles, but they will never have up above 20 yards at the same time, and they will never have even that length up, they say, for above two days. That agrees with one's experience from what one observes when similar works are going on in the metropolis. They are no sooner begun than ended.

"The circumstance of the works being performed in this case in a vast number of places in the course of the next two or three years, or the next year, during which time the process of laying down the pipes will be going on, does not appear to me at all to vary the case. One must look at the quantum of evil at each particular place and at each particular moment of time to determine whether this injunction ought to be granted.

"It may be asked by way of illustration, why does not the court restrain persons from coming with barrel-organs through a town and disturbing the peace of the inhabitants? No doubt it would be a very serious nuisance

GILBERT *v.* SHOWERMAN, 1871, 23 MICH. 448.—COOLEY, J. . . . Generally speaking, it may be said that every man has a right to the exclusive and undisturbed enjoyment of his premises, and to the proper legal redress if this enjoyment shall be interrupted or diminished by the act of others. The redress, if the injury is slight or merely casual, or if it is in any degree involved in doubt, should be by action for the recovery of damages; but if permanent in its nature, so that by persistence in it the wrongdoer might, in time, acquire rights against the owner, it is admissible for the court of chancery to interfere by injunction, provided the injury is conceded or clearly established. Webb *v.* Portland Manuf. Co., 3 Sum. 189; Walker *v.* Shepardson, 2 Wis. 384; though the power to do so should be cautiously and sparingly exercised. Attorney-General *v.* Nichol, 16 Ves. 338; Rosser *v.* Randolph, 7 Port. 238. An offensive trade or manufacture may call as legitimately for the interference of equity as any other nuisance, for, as is said by Sir WILLIAM BLACKSTONE, though these are lawful and necessary, yet they should be exercised in remote places. 2 Bl. Com. 217; Catlin *v.* Valentine, 9 Paige, 575; Hackney *v.* State, 8 Ind. 494. The right, nevertheless, to have such a business restrained is not absolute and unlimited, but is, and must be in the nature of things, subject to reasonable limitations which have regard to the rights of others not less than to the general public welfare. One man's comfort and enjoyment with reference to his ownership of a parcel of land cannot be considered by itself distinct from the desires and interests of his neighbors, as otherwise the wishes of one might control a whole community, and the person most ready to complain might regulate to suit himself, the business that should be carried on in his neighborhood. In a crowded city some annoyance to others is inseparable from almost any employment, and while the proximity of the stables of the dealers in horses, or of the shops of workers in iron or tin, seems an intolerable nuisance to one, another is annoyed and incommoded, though in less degree, by the bundles and boxes of the dealer in dry goods, and the noise and jar of the wagons which deliver and remove them. Indeed, every kind of business is generally regarded as undesirable in the parts of a city occupied most exclusively by dwellings, and the establishment of the most cleanly and quiet warehouse might, in some neighborhoods,

if a person with a barrel-organ or bag-pipes were to station himself under one's window all day; that would be a nuisance. But when he is going through a city, you know, he will stop ten minutes at one place and ten minutes at another, and so he will go on all day. If the one sort of nuisance could be restrained, I do not see why the other could not. There is a distinction, no doubt; the one interferes with the soil, the other does not involve any interference with the soil. I do not see in point of principle that this distinction makes any great difference." Per Lord Chancellor CRANWORTH, in Atty.-Gen. *v.* Sheffield Gas Consumers' Co., 1853, 3 DeG. M. & G. 304, 336; see also, Harrison *v.* Southark and Vauxhall Water Company, 1891, L. R. 2 Ch. Div. 409.

give serious offense and cause great annoyance to the inhabitants. This cannot be otherwise so long as the tastes, desires, judgments and interests of men differ as they do, and no rule of law can be just which, in endeavoring to protect the interests and subserve the wishes of a complaining party, fails to have equal regard to the interests and wishes of others. The true principle has been said by an eminent jurist to be one "growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community, All property is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient."—SHAW, Ch.J., in Commonwealth *v.* Alger, 7 Cush. 84.

In the case before us we find that the defendants are carrying on a business not calculated to be especially annoying, except to the occupants of dwellings. They chose for its establishment a locality where all the buildings had been constructed for purposes other than for residence. Families, to some extent, occupied these buildings, but their occupation was secondary to the main object of their construction, and we must suppose that it was generally for reasons which precluded the choice of a more desirable neighborhood. The number of these families, moreover, was decreasing, and in view of the size of the block, was really insignificant at the time this machinery was put in. Some kinds of business were then carried on in the block, which were likely to be equally offensive to adjoining proprietors with that of the defendants, and it is not shown that any complaint was made of them. In view of these facts we think it is not shown that the defendants were bound to know they were invading the legal rights of other persons when they established their present business, nor can we say that the evidence satisfies us that they selected an unsuitable locality for the purpose.

We cannot shut our eyes to the obvious truth that if the running of this mill can be enjoined, almost any manufactory in any of our cities can be enjoined upon similar reasons. Some resident must be incommoded or annoyed by almost any of them. In the heaviest business quarters and among the most offensive trades of every city, will be found persons who, from motives of convenience, economy or necessity, have taken up their abode; but in the administration of equitable police, the greater and more general interests must be regarded rather than the inferior and special. The welfare of community cannot be otherwise subserved and its necessities provided for. Minor inconveniences must

be remedied by actions for the recovery of damages rather than by the severe process of injunction.

On the whole case we are of opinion that the complainant, having taken up his residence in a portion of the city mainly appropriated to business purposes, cannot complain of the establishment of any new business near him, provided such new business is not in itself objectionable as compared with those already established, and is carried on in a proper manner. We do not find from the evidence that the business of defendants was thus objectionable, or that in the manner of conducting it there is special ground of complaint. And the decree dismissing the bill must, therefore, be affirmed with costs. But the dismissal is to be without prejudice to any proceeding the complainant may be advised to take at law.

The other justices concurred.[1]

[1] Where the occupier of lands grants a license to another to do certain acts on the land, and the licensee in doing them commits a nuisance, the occupier may be made a defendant to a suit to restrain the nuisance, White *v.* Jameson, 1873, L. R., 18 Eq. 303. A tenant may bring a bill to enjoin a nuisance affecting the demised property during his tenancy; while the landlord protects his reversion in like manner. Shelfer *v.* London Electric Lighting Company, 1895, 1 Ch. Div. 287. But in such a case the landlord must show injury to the reversion as distinguished from the tenancy, Jones *v.* Chappell, 1875, L. R. 20 Eq. 539.

"My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance on the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in the shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not apply to circum-

MOUNTAIN COPPER CO. *v.* UNITED STATES.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, 1906.

[142 *Federal Reporter* 625.]

The United States, in its capacity of landowner, brings a bill to enjoin the defendant Copper company from continuing to injure and destroy the timber and other vegetation upon the complainant's land by the fumes and smoke produced in the process of roasting and burning its ores.

Ross, Circuit Judge.[1]

We have, then, the ownership in the complainant of a little over 4,000 acres of land within the damaged zone, mountainous in character, with little or no soil, practically worthless for agriculture or horticulture, upon which most of such trees and undergrowth as existed had, prior to the commencement of this suit, been killed by the fumes generated by the appellant company (for which it is, of course, liable in damages for whatever they may have been worth), and upon which but little more vegetation of any kind remains, susceptible of destruction. In view of these facts, about which there can be no question upon the record, can it be doubted that the maximum injury that can result to the lands of the complainant embraced by the bill is but a mere trifle in comparison to the loss inflicted by the injunction in question upon the appellant company and those dependent upon and benefited by it? And, such being the case, would it be a wise exercise of the sound discretion we are called upon to exercise to sustain such injunction? We are of the opinion that it would not be, and we are not without abundant authority to sustain that position.

No one, we apprehend, will contend that the smelting of copper ores is, in and of itself, unlawful. On the contrary, it has become one of the most useful and necessary employments, especially since the use of copper, in its manifold forms, has increased so enormously, to the benefit, not only of those actually producing it, but to the state, nation, and world at large. Brickmaking is also a useful and legitimate employment. In considering and deciding a case of that sort Mr. Justice AGNEW, in delivering the opinion of the Supreme Court of Pennsylvania, in Huckenstine's Appeal, 70 Pa. 102, 106, 10 Am. Rep. 669, said:

"It, as many other useful employments do, may produce some discomfort, and even some injury, to those near by. But it does not follow that a chancellor would enjoin therefore. The heat, smoke, and vapor of a brick kiln cannot compare with those of many manufactories carried on

stances the immediate result of which is sensible injury to the value of the property." Per Lord WESTBURY, in St. Helen's Smelting Co. *v.* Tipping, 1865, 11 H. L. C. 642, 650.

[1] A part only of the opinion is printed.

in the very heart of such busy cities as Pittsburg and Allegheny. A court, exercising the power of a chancellor, whose arm may fall with crushing force upon the every-day business of men, destroying lawful means of support, and diverting property from legitimate uses, cannot approach such cases as this with too much caution. Its aid is not of right, but of grace, and it must be sure that the exercise of this kingly power is just, wise, and proper, before it takes from a citizen his means of livelihood, and destroys the value of his property for legitimate uses." [1]

In Tuttle *v.* Church, C. C., 53 Fed. 422, an injunction was sought to restrain the defendants from the manufacture of fish oil and fertilizers, on the ground that the smoke and offensive odors from the defendants' factory blew over the complainants' dwelling, thereby corrupting the air, destroying the comfortable and convenient use of the premises, and diminishing their value. The defendants employed 450 men in their works, and their plant was valued at $300,000. The complainants' property cost them, with improvements, $2,750, and they had offered to sell it for $3,500. Other facts are stated in the opinion in the case. Judge COLT, in refusing the injunction sought, said, among other things:

"A motion for an injunction is addressed to the sound discretion of the court, guided by certain established rules. This means that the court is to consider all the circumstances of each case before it will exercise this extraordinary remedy. Among the considerations which should influence a chancellor is the relative effect upon the parties of granting or refusing the injunction. Unless the public good calls for the injunction to issue, it should not be granted where a large number of people are in favor of the acts to be restrained and no serious damage to individuals is made to appear. Where the right of law is doubtful, the case resolves itself into a question of comparative injury—whether the defendants will be more injured by the injunction being granted, or the plaintiffs by its being withheld. In the present case the effect of an injunction, according to the evidence, will be to close the defendants' works, destroy their business, and thereby cause the loss of a large amount of invested capital, while the injury to the plaintiffs if the injunction is refused, is comparatively slight"—citing a number of cases.

The nuisance complained of in Powell *v.* Bentley & Gerwig Furniture Co., W. Va., 12 S. E. 1085, 12 L. R. A. 53, was the noise of the factory. The court there said:

"Although a court of equity in such cases follows precedent, and goes by rule as far as it can, yet it follows its own rules—and among them is the one that to abate or restrain in case of nuisance is not a matter of strict right, but of orderly and reasonable discretion, according to the right of the particular case—and hence will refuse relief and send the party to a court of law when damages would be a fairer approximation to common justice, because to silence a useful and costly factory is often

[1] The court here quotes from Demarest *v.* Hardham, 1881, 34 N. J. Eq. 469. See note to page 753.

a matter of serious moment to the state and town, as well as to the owner."

Indeed, that the comparative convenience or inconvenience to the parties from the granting or withholding the injunction sought should be considered, and that none should be granted whenever it would operate oppressively or inequitably, or contrary to the real justice of the case, is the well-established doctrine, and we need hardly multiply authorities to that effect. Amelia Milling Co. *v.* Tennessee Coal Co., C. C., 123 Fed. 811; Sellers *v.* Parvis, C. C., 30 Fed. 166; Peterson *v.* City of Santa Rosa, 119 Cal. 391, 51 Pac. 557; 1 Spelling on Injunctions, § 417; 2 Story's Eq. Jur. § 959; Kerr on Injunctions, 231.

In Madison *v.* Ducktown Sulphur, Copper & Iron Co., Tenn., 83 S. W. 658, it appeared that several farmers had brought suit to enjoin the operation of a copper smelting plant because of injury to their lands by the fumes. The plant was in a basin of the mountains. The complainants' farms were in the surrounding hills, and were far more seriously injured than have been the lands of the United States involved in the present case; for they had timber and crops which were practically destroyed. In that case it was found that the defendant company was conducting its business in a lawful way, without any purpose to injure any of the complainants, and was following the only known method by which copper smelting could be successfully carried on, but was unable to dispose of the sulphurous fumes, and that there was no more remote place to which its operations could be transferred; that the defendant employed about 2,500 men in its works, supporting about 12,000 people, whereas, before the commencement of their operations, the population of the vicinity did not exceed 200; that the company paid to its employees about $1,000,000 annually for wages, and paid about one-half of the taxes of the county in which its property was situated, besides paying out a large amount for supplies; that if the injunction sought were granted the defendant company would be compelled to stop the operation of its plant and its property would become valueless. The facts in that case, which arose in Tennessee, were, therefore, strikingly similar to those in the case at bar, except for the important difference that there the complainants were actual resident proprietors, who had suffered serious pecuniary loss. The Supreme Court of Tennessee declared that the controlling principle in such cases is—

"That the granting of an injunction is not a matter of absolute right, but rests in the sound discretion of the court, to be determined on a consideration of all of the special circumstances of each case, and the situation and surroundings of the parties with a view to effect the ends of justice. A judgment for damages in this class of cases is a matter of absolute right, where injury is shown. A decree for an injunction is a matter of sound legal discretion, to be granted or withheld as that discretion shall dictate, after a full and careful consideration of every element appertaining to the injury."

And after citing numerous authorities in support of that principle, thus applied it to the case then before the court:

"The question now to be considered is, what is the proper exercise of discretion, under the facts appearing in the present case? Shall the complainants be granted, in the way of damages, the full measure of relief to which their injuries entitle them, or shall we go further, and grant their request to blot out two great mining and manufacturing enterprises, destroy half of the taxable values of a county, and drive more than 10,000 people from their homes? We think there can be no doubt as to what the true answer to this question should be. In order to protect by injunction several small tracts of land, aggregating in value less than $1,000, we are asked to destroy other property worth nearly $2,000,000, and wreck two great mining and manufacturing enterprises that are engaged in work of very great importance, not only to their owners, but to the State, and to the whole country as well, and to depopulate a large town, and deprive thousands of working people of their homes and livelihood, and scatter them broadcast. The result would be practically a confiscation of the property of the defendants for the benefit of the complainants—an appropriation without compensation, The defendants cannot reduce their ores in a manner different from that they are now employing, and there is no more remote place to which they can remove. The decree asked for would deprive them of all their rights. We appreciate the argument based upon the fact that the homes of the complainants who live on the small tracts of land referred to are not so comfortable and useful to their owners as they were before they were affected by the smoke complained of, and we are deeply sensible of the truth of the proposition that no man is entitled to any more rights than another on the ground that he has or owns more property than that other. But in a case of conflicting rights, where neither party can enjoy his own without in some measure restricting the liberty of the other in the use of the property, the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances. We see no escape from the conclusion in the present case that the only proper decree is to allow the complainants a reference for the ascertainment of damages, and that the injunction must be denied to them, except in the qualified manner indicated."

In the case before us the land of the complainant within the damaged zone is, according to the evidence, not timber land, and is practically worthless for agricultural and horticultural purposes, for the reason that it has little or no soil. Most of such trees and underbrush that has stood thereon had been killed prior to the beginning of this suit, and such vegetation as then remained was of very small value. The testimony in respect to the lack of value in this land of the complainant is corroborated by the circumstance that, although it is in close proximity to the railroad connecting the cities of San Francisco and Portland, and but a com-

paratively short distance from the towns of Redding and Shasta, yet no purchaser seems to have taken any of it at the government price of $1.25 per acre, though it has been open to purchasers for about 50 years, nor did a single homesteader, so far as appears, ever settle upon any of it during all of the years it was offered by the government as a gift to such settlers.

For the reasons stated the judgment is reversed, and the cause remanded, with directions to the court below to dismiss the bill.

SECTION 4. LABOR DISPUTES.

SPRINGHEAD SPINNING CO. *v.* RILEY.

IN CHANCERY, BEFORE SIR RICHARD MALINS, V. C., 1868.

[*L. R.*, 6 *Eq.* 551.]

July 31. Sir R. MALINS, V. C., after stating the facts, and referring to the Acts 6 Geo. 4, c. 129, the Masters and Workmen's Act, and the Act of 1859, 20 & 21 Vist. c. 43, continued:—

These Acts have received an authoritative construction in the direction of Mr. Baron Bramwell to the jury in the case of Reg. *v.* Druitt, 16 L. T. N. S. 855. The substance of that judgment, in which I entirely concur, is this:—That every man is at liberty to induce others, in the words of the Act of Parliament, "by persuasion or otherwise," to enter into a combination to keep up the price of wages, or the like; but directly he enters into a combination which has as its object intimidation or violence, or interfering with the perfect freedom of action of another man, it then becomes an offence not only at common law, but also an offence punishable by the express enactment of the Act 6 Geo. 4, c. 129. It is clear, therefore, that the printing and publishing of these placards and advertisements by the Defendants, admittedly for the purpose of intimidating workmen from entering into the service of the Plaintiffs, are unlawful acts, punishable by imprisonment under the 6 Geo. 4, c. 129, and a crime at common law.

But if these acts amount to the commission of a crime only, it is clear that this Court has no jurisdiction to restrain them. In the celebrated case of Gee *v.* Pritchard, 2 Sw. 402, 413, the object of which was to restrain the publication of letters written by the Plaintiff to the Defendant, Lord ELDON says: "The publication of a libel is a crime, and I

have no jurisdiction to prevent the commission of crimes, excepting, of course, such cases as belong to the protection of infants where a dealing with an infant may amount to crime—an exception arising from that peculiar jurisdiction of this Court." Further on Lord ELDON says: "The question will be, whether the bill has stated facts of which the Court can take notice, as a case of civil property, which it is bound to protect."

Lord CAMPBELL, in the case of the Emperor of Austria *v.* Day, 3 D. F. & J. 239, quotes that passage with approbation.

The jurisdiction of this Court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or to make it less valuable or comfortable for use or occupation. It will interfere to prevent the destruction of property, as shown by Lowndes *v.* Bettle, 33 L. J. Ch. 451.

The familiar cases of light and air, nuisance, and trade-marks, will illustrate what I have said, namely, that the Court will interfere where the acts complained of go to the destruction or material diminution of the value of property. It is distinctly charged by this bill, and it is consequently admitted by the demurrers, that the acts of the Defendants which are complained of do tend to the immediate destruction of the value of the Plaintiffs' property. The 30th and 31st paragraphs of the bill go distinctly to this point, and in the 17th paragraph it is stated that these placards and advertisements are, in fact, part of a scheme of the Defendants whereby they, by threats and intimidation, prevent persons from hiring themselves to or accepting work from the Plaintiffs. If the Defendants Riley and Butterworth had carried on a manufactory in the neighbourhood of the Plaintiffs' works, and had by any process poured noxious vapours into the Plaintiffs' mill to such an extent as to render it impossible for them to procure workmen to carry on their operations, that would have been a nuisance tending to the destruction of the Plaintiffs' property which this Court would have restrained by injunction; and so it would if the Defendants had, by darkening their ancient lights, rendered it impossible or even difficult to carry on their trade; and so if the Defendants had, by constructing a material obstruction, such as building a wall, rendered the access by the workpeople of the Plaintiffs to their mill impossible. Why should the Defendants be less amenable to the purisdiction of this Court because they proceed to destroy the value of the Plaintiffs' property in another but not less efficacious mode, namely, by their threats and intimidation rendering it impossible for the Plaintiffs to obtain workmen, without whose assistance the property becomes utterly valueless for the purposes of their trade?

The truth, I apprehend, is, that the Court will interfere to prevent acts amounting to crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of property. That was the

principle on which the Court restrained the proceedings of M. Kossuth, with regard to the Hungarian notes in the case of the Emperor of Austria *v.* Day, 3 D. F. & J. 217. Lord Chancellor CAMPBELL says, 3 D. F. & J. 232:—"I agree that the jurisdiction of this Court in a case of this nature rests upon injury to property actual or prospective, and that this Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property, but I think there are here rights of property quite sufficient to found jurisdiction in this Court. I do not agree to the proposition that there is no remedy in this Court if there be no remedy at law, and still less do I agree to the proposition that this Court is bound to send a matter of this description to be tried at law."

The same rule is in effect laid down by Lord ELDON in the celebrated case of Macaulay *v.* Shackell, I Bli. N. S. 96, 127. Lord ELDON there says:—"The Court of Equity has no criminal jurisdiction, but it lends its assistance to a man who has, in the view of the law, a right of property, and who makes out that an action at law will not be a sufficient remedy and protection against intruding upon his publication."

In the present case, the acts complained of are illegal and criminal by the Act of Geo. 4, and it is admitted by the demurrers that they were designedly done as part of a scheme, by threats and intimidation, to prevent persons from accepting work from the Plaintiffs, and, as a consequence, to destroy the value of the Plaintiffs' property. It is, in my opinion, within the jurisdiction of this Court to prevent such or any other mode of destroying property, and the demurrers must, therefore, be overruled.

The Defendant Carrodus, as stated in the bill, persisted in reprinting and re-publishing the placards and advertisements after a warning from the Plaintiffs, and his demurrer must consequently be overruled.

In coming to this conclusion I desire to be understood as deciding simply on what appears upon this bill and these demurrers. For the reasons I have stated I overrule these demurrers, because the bill states, and the demurrers admit, acts amounting to the destruction of property. Upon the general question whether this Court can interfere to prevent these unlawful proceedings by workmen issuing placards amounting to intimidation, and whether acts of intimidation generally would go to the destruction of property, that will probably have ultimately to be decided at the hearing of this cause. In the meantime I would only make this observation, that by the Act of Parliament it is recited that all such proceedings are injurious to trade and commerce, and dangerous to the security and personal freedom of individual workmen, as well as the security of the property and persons of the public at large; and if it should turn out that this Court has jurisdiction to prevent these misguided and misled workmen from committing these acts of intimidation, which go to the destruction of that property which is the

source of their own support and comfort in life, I can only say that it will be one of the most beneficial jurisdictions that this Court ever exercised.

With regard to the costs, I do not intend, considering the novelty and importance of the question raised by this bill and these demurrers, to overrule them with costs in the ordinary course, but I shall reserve the costs.

SHERRY AND OTHERS *v.* PERKINS AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1888.

[147 *Massachusetts* 212.]

Bill in equity, filed April 20, 1887, alleging that the first-named plaintiff was engaged in the business of manufacturing boots and shoes in Lynn, and that he had admitted the other plaintiffs, who were in his employment as operatives, to share in the profits of the business; that there was a voluntary association in Lynn called the Lasters' Protective Union, composed of persons engaged in lasting boots and shoes, of which the first-named defendant was the president, and the other defendant, Charles H. Leach, was the secretary; that on January 5, 1887, Leach, acting for himself and Perkins, called upon Sherry to inquire as to the wages of his lasters, and was told that such wages were to be fixed by the lasters; that on January 8, 1887, certain lasters left the plaintiff's employment, giving as a reason therefore that they did not dare to work for them further on account of the defendants; that, in order to intimidate others from taking their places and to prevent such lasters from re-engaging in their employment, the defendants, on January 8, 1887, with the assent of the association and out of its moneys, caused to be carried in front of Sherry's factory, by a boy hired for that purpose, a banner bearing the following inscription: "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U."

The bill further alleged, that, because of such banners, crowds of people gathered in front of the factory when the lasters left their work; that the lasters were injured and threatened with bodily harm if they continued in the plaintiff's employment; that various lasters, whose names were given, were subsequently called upon by the defendants, and so

intimidated and injured that one of them was confined to his house and another left the plaintiff's employment; that the banner and the acts of the defendants were part of a scheme to prevent persons from entering the plaintiff's employment, and that the banner was carried in front of the factory until March 22, 1887, when the defendants, with a like purpose and at a time when there was no strike in the factory or trouble with the operatives, caused another banner to be carried in like manner before the factory, with the following inscription: "Lasters on a strike and lasters are requested to keep away from P. P. Sherry's until the present trouble is settled. Per order L. P. U."

The bill also alleged that Sherry had remonstrated with the defendants without effect; that the business carried on by the plaintiffs was a large one, and that the good-will was of considerable value, both of which, if the defendants were permitted to continue, would be seriously injured and destroyed.

The prayer of the bill was, that the defendants might be restrained from making such banners, and from causing them to be similarly carried, and for further relief.

Hearing before C. ALLEN, J., who found as facts, that members of the Lasters' Protective Union entered into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiffs as lasters from continuing in such employment, and in like manner to prevent other persons from entering into such employment as lasters; that the defendants participated in this scheme; that the use of the banners was a part of the scheme; that the first banner was carried from January 8, 1887, to March 22, 1887, and the second banner from March 22, 1887, to the time of the hearing; and that the plaintiffs have been and are injured in their business and property thereby; and the judge reported the case for the consideration of the full court.

W. ALLEN, J. The case finds that the defendants entered, with others, into a scheme, by threats and intimidations, to prevent persons in the employment of the plaintiffs from continuing in such employment, and to prevent others from entering into such employment; that the banners with their inscriptions were used by the defendants as part of the scheme; and that the plaintiffs were thereby injured in their business and property.

The act of displaying banners with devices, as a means of threats and intimidation to prevent persons from entering into or continuing in the employment of the plaintiffs, was injurious to the plaintiffs, and illegal at common law and by statute, Pub. Sts. c. 74, § 2; Walker *v.* Cronin, 107 Mass. 555. We think that the plaintiffs are not restricted to their remedy by an action at law, but are entitled to relief by injunction. The acts and the injury were continuous. The banners were used more than three months before the filing of the plaintiff's bill, and continued to be used at the time of the hearing. The injury

was to the plaintiff's business, and adequate remedy could not be given by damages in a suit at law.

The wrong is not, as argued by the defendants' counsel, a libel upon the plaintiffs' business. It is not found that the inscriptions upon the banners were false, nor do they appear to have been in disparagement of the plaintiffs' business. The scheme in pursuance of which the banners were displayed and maintained was to injure the plaintiffs' business, not by defaming it to the public, but by intimidating workmen, so as to deter them from keeping or making engagements with the plaintiffs. The banner was a standing menace to all who were or wished to be in the employment of the plaintiffs, to deter them from entering the plaintiffs' premises. Maintaining it was a continuous unlawful act, injurious to the plaintiffs' business and property, and was a nuisance such as a court of equity will grant relief against.. Gilbert *v.* Mickle, 4 Sandf. Ch. 357; Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551.

Boston Diatite Co. *v.* Florence Manuf. Co., 114 Mass. 69, was a case of defamation only. Some of the language in Springhead Spinning Co. *v.* Riley has been criticised, but the decision has not been overruled. See Boston Diatite Co. *v.* Florence Manuf. Co., *ubi supra;* Prudential Assurance Co. *v.* Knott, L. R. 10 Ch. 142; Saxby *v.* Easterbrook, 3 C. P. D. 339; Thorley's Cattle Food Co. *v.* Massam, 14 Ch. D. 763; Thomas *v.* Williams, 14 Ch. D. 864; Day *v.* Brownrigg, 10 Ch. D. 294; Gaskin *v.* Balls, 13 Ch. D. 324; Hill *v.* Davies, 21 Ch. D. 798; Hermann Loog *v.* Bean, 26 Ch. D. 306.

Decree for the plaintiffs.

THE JERSEY CITY PRINTING CO. *v.* CASSIDY ET AL.

IN THE COURT OF CHANCERY OF NEW JERSEY, 1902.

[63 *New Jersey Equity* 759.]

On motion, on order to show cause, for an injunction to restrain defendants, former employes of the complainant, and now on strike, from unlawful interference with the complainant's business, the employment of workmen, etc. Heard on bill, answer and affidavits.

Upon filing the bill an order was made restraining the defendants "from in any manner knowingly and intentionally causing or attempting to cause by threats, offers of money, payment of money, offering to pay or the payment of transportation expenses, inducements or persuasions to any employe or the complainant under contract to render service to it to break such contract by quitting such service; from any and all personal

molestation of persons willing to be employed by complainant with intent to coerce such persons to refrain from entering such employment; from addressing persons willing to be employed by complainant against their will and thereby causing them personal annoyance with a view to persuade them to refrain from such employment; from loitering or picketing in the streets near the premises of complainant, Nos. 68 and 70 York street, and No. 37 Montgomery street, Jersey City, with intent to procure the personal molestation and annoyance of persons employed or willing to be employed by complainant and with a view to cause persons so employed to quit their employment, or persons willing to be employed by complainant to refrain from such employment; from entering the premises of complainant, Nos. 68 and 70 York street, Jersey City, against its will with intent to interfere with its business; from violence, threats of violence, insults, indecent talk, abusive epithets practiced upon any persons without their consent with intent to coerce them to refrain from entering the employment of complainant, or to leave its employment."

STEVENSON, V.C. (orally).

The bill is filed to restrain a body of workmen, who are on a strike, and other persons associated with them, from doing certain things which are alleged to be injurious to the complainant, their former employer. The things that they are restrained from doing are specified in the restraining order. That order was not made hastily. It was formulated with care on the part of the court, and I do not understand that counsel for the defendant criticises its terms on the ground that they are too broad. The defence is that the persons who are enjoined have not been doing, and are not threatening now to do, any of those things that are interdicted. That is the sum and substance of the defence, which has been presented by a great many affidavits and with very great force.

The order does not interfere with the right of the workmen to cease his employment for any reasons that he deems sufficient. It does not undertake to say that workmen may not refuse to be employed if certain other classes of workmen are retained in employment. It leaves the workman absolutely free to abstain from work—for good reasons, for bad reasons, for no reasons. His absolute freedom to work, or not to work, is not in any way impaired. The restraining order is based upon the theory that the right of the workman to cease his employment, to refuse to be employed, and to do that in conjunction with his fellow-workmen, is just as absolute as is the right of the employer to refuse further to employ one man, or ten men, or twenty men who have theretofore been in his employment. From an examination of the cases and a very careful consideration of the subject I am unable to discover any right in the courts, as the law now stands, to interfere with this absolute freedom on the part of the employer to employ whom he will, and to cease to employ whom he will; and the corresponding freedom on the part of the workman, for any reason or no reason, to say that he will no longer be employed; and the further right of the workmen, of their own free will,

to combine and meet as one party, as a unit, the employer who, on the other side of the transaction, appears as a unit before them. Any discussion of the motives, purposes or intentions of the employer in exercising his absolute right to employ or not to employ as he sees fit, or of the free combination of employes in exercising the corresponding absolute right to be employed or not as they see fit, seems to me to be in the air.

Thus, there is a wide field in which employes may combine and exercise the arbitrary right of "dictating" to their common employer "how he shall conduct his business." The exact correlative of this right of the employe exists, in an equal degree, in the employer. He may arbitrarily "dictate" to five thousand men in his employ in regard to matters in respect of which their conduct ought, according to correct social and ethical principles, to be left entirely free. But if the "dictation" is backed up solely by the announcement that, if it is not submitted to, the dictating party will refrain from employing, or refrain from being employed, as the case may be, no legal or equitable right belonging to the party dictated to, which I am able to discern, is thereby invaded.

It is easier, I think, to obtain a correct idea of the legal and equitable right which underlies many of the injunctions which have been granted in these strike cases restraining combinations of workmen from interfering with the natural supply of labor to an employer, by means of molestation and personal annoyance, if we exclude from consideration the conduct of the defendants as a cause of action on behalf of the immediate victims of their molestation—i. e., of the workman or workmen whom the combination are seeking to deter from entering into the employment which is offered to them, and which they, if let alone, would wish to accept. I say this, although I firmly believe that the molested workman, seeking employment and unreasonably interfered with in this effort by a combination, has an action for damages at common law, and, where the molestation is repeated and persistent, has the same right to an injunction, in equity, which, under the same circumstances, is accorded to his contemplated employer.

The underlying right in this particular case under consideration, which seems to be coming into general recognition as the subject of protection by courts of equity, through the instrumentality of an injunction, appears to be the right to enjoy a certain free and natural condition of the labor market, which, in a recent case in the House of Lords, was referred to, in the language of Lord ELLENBOROUGH, as a "probable expectancy." This underlying right has otherwise been broadly defined or described as the right which every man has to earn his living, or to pursue his trade or business, without undue interference, and might otherwise be described as the right which every man has, whether employer or employe, of absolute freedom to employ or to be employed. The peculiar element of this perhaps newly-recognized right is that it is an interest which one man has in the freedom of another. In the case before

this court the Jersey City Printing Company claims the right, not only to be free in employing labor, but also the right that labor shall be free to be employed by it, the Jersey City Printing Company.

A large part of what is most valuable in modern life seems to depend more or less directly upon "probable expectancies." When they fail, civilization, as at present organized, may go down. As social and industrial life develops and grows more complex these "probable expectancies" are bound to increase. It would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue interference more of these "probable expectancies."

In undertaking to ascertain and define the rights and remedies of employers and employes, in respect of their "probable expectancies" in relation to the labor market, it is well not to lose sight altogether of any other analogous rights and remedies which are based upon similar "probable expectancies." It will probably be found in the end, I think, that the natural expectancy of employers in relation to the labor market and the natural expectancy of merchants in respect to the merchandise market must be recognized to the same extent by courts of law and courts of equity and protected by substantially the same rules.

It is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to insure to every dealer on either side of the market. The valuable thing to merchant and to customer, to employer and to employe, manifestly is freedom on both sides of the market. The merchant, with his fortune invested in goods and with perfect freedom to sell, might be ruined if his customers were deprived of their freedom to buy; the purchaser, a householder, seeking supplies for his family, with money in his pocket and free to buy, might find his liberty of no value and might suffer from lack of food and clothing if the shopmen who deal in these articles were so terrorized by a powerful combination as to be coerced into refusing to sell either food or clothing to him.

It is, however, the right of the employer and employe to a free labor market that is the particular thing under consideration in this case.

A man establishes a large factory where working people reside, taking the risk of his being able to conduct his industry and offer these working people employment which they will be willing to accept. He takes the risk of destructive competition and a large number of other risks, out of which, at any time, may come his financial ruin and the suspension of his manufacturing works. But our law, in its recent development, undertakes to insure to him, not only that he may employ whom he pleases, but that all who wish to be employed by him may enter into and remain in such employment freely, without threats of harm, without unreasonable molestation and annoyance from the words, actions or other conduct of any other persons acting in combination. What is the

measure or test by which the conduct of a combination of persons must be judged in order to determine whether or not it is an unlawful interference with freedom of employment in the labor market, and as such injurious to an employer of labor in respect of his "probable expectancies," has not as yet been clearly defined. Perhaps no better definition could be suggested than that which may be framed by conveniently using that important legal fictitious person who has taken such a large part in the development of our law during the last fifty years—the reasonably prudent, reasonably courageous and not unreasonably sensitive man. Precisely this same standard is employed throughout the law of nuisance in determining what degree of annoyance on the part of one's neighbor one must submit to, and what degree of such annoyance is excessive and the subject of an action for damages or a suit for an injunction.

A man may not be liable to an action for slander for calling a workman a "scab" in the street, but if a hundred men combine to have this workman denounced as a "scab" in the street, or followed in the streets to and from his home, so as to attract public attention to him and place him in an annoyingly conspicuous position, such conduct, the result of such combination, is held to be an invasion of the "probable expectancy" of his employer or contemplated employer, an invasion of this employer's right to have labor flow freely to him. Without any regard to the rights and remedies which the molested workman may have, the injunction goes at the suit of the employer to protect his "probable expectancy"—to secure freedom in the labor market to employ and to be employed, upon which the continuance of his entire industry may depend.

I think it is safe to say that all through this development of strike law, during the last decade, no principle becomes established which does not operate equally upon both employer and employe. The rights of both classes are absolutely equal in respect of all these "probable expectancies." An operator upon printing machines has the right to offer his labor freely to any of the printing shops in Jersey City. These shops may all combine to refuse to employ him on account of his race, or membership in a labor union, or for any other reason, or for no reason, precisely as twenty employes in one printing shop may combine and arbitrarily refuse to be further employed unless the business is conducted in accordance with their views. But in the case of the operative seeking employment, he has a right to have the action of the masters of the printing shops, in reference to employing him, left absolutely free. If, after obtaining, or seeking to obtain, employment in a shop, the master of that shop should be subjected to annoyances and molestation, instigated by the proprietors of other printing shops, who combine to compel, by such molestation and annoyance, this one master printer, against his will and wish, to exclude the operative from employment, this operative, in my judgment, would have a right to an action at law for damages, and would have a right to an injunction if his case presented the other ordinary conditions upon which injunctions issue. But the common law courts have not had time

to speak distinctly on this subject as yet, and it is necessary to be cautious in dealing with a subject in which both courts of law and courts of equity as yet are feeling their way.

I think that the leading principle enforced in the restraining order in this case is not inconsistent with any authorities which control this court. This principle is that a combination of employers, or a combination of employes, the object of which is to interfere with the freedom of the employer to employ, or of the employe to be employed (in either of which cases there is an interference with the enjoyment of a "probable expectancy," which the law recognizes as something in the nature of property), by means of such molestation or personal annoyance as would be liable to coerce the person upon whom it was inflicted, assuming that he is reasonably courageous and not unreasonably sensitive, to refrain from employing or being employed, is illegal and founds an action for damages on the part of any person knowingly injured in respect of his "probable expectancy" by such interference, and also, when the other necessary conditions exist, affords the basis of an injunction from a court of equity.

The doctrine which supports that portion of the restraining order in this case which undertakes to interdict the defendants from molesting applicants for employment as an invasion of a right of the complainant, is applicable to a situation presenting either an employer or an employe as complainant, and containing the following elements:

First. Some person or persons desiring to exercise the right of employing labor, or the right of being employed to labor.

Second. A combination of persons to interfere with that right, by molestation or annoyance, of the employers who would employ, or of the employes who would be employed, in the absence of such molestation.

How far the element of combination of a number of persons will finally be found necessary, in order to make out the invasion of a legal or equitable right in this class of cases, need not be discussed. We are dealing with cases where powerful combinations of large numbers, in fact, exist.

Third. Such a degree of molestation as might constrain a person having reasonable fortitude, and not being unreasonably sensitive, to abandon his intention to employ or to be employed, in order to escape such molestation.

Fourth. As the result of the foregoing conditions, an actual pecuniary loss to the complaining party, by the interference with his enjoyment of his "probable expectancies" in respect of the labor market.

I do not think that the constraining force brought to bear upon the employer or employe which the law can interdict can ever include the power of public opinion or even of class opinion. Every man, whether an employer or an employe, constitutes a part of a great industrial system, and his conduct is open to the criticism of the members of his own class. While, therefore, a combination of union men have no right to cry "scab" in the streets to non-union employes, or follow them in the

street in a body to and from their homes, or do many other things in combination, which, if done once by a single individual, would not found an action of tort, such combinations, I think, have left a fairly wide field of effort towards the creation and application of public opinion as a constraining force upon conduct of any kind which they wish to discourage.

I have endeavored to explain, in a general way, my own view of the most important and least understood principle embodied in the restraining order in this case, in order that the defendants, and, in fact, all parties interested, may have all possible light in construing and applying the exact terms of the order. What I have said may be found to be subject to modifications, without subjecting the terms of the order to any change. All generalizations on such a subject—such a novel subject as the one under consideration—are dangerous. There may be conduct on the part of a combination of employers, or of employes, which would seem to come within the general definition or description of illegal and prohibited conduct, which I have attempted to frame, but which conduct, nevertheless, might be justified, and hence could not be adjudged illegal. Molestation and personal annoyance, however, the terms which I have employed, do not seem to be inclusive of any justifiable conduct, especially if no one is allowed to complain that he is molested or annoyed by being subjected peaceably to the judgment and criticism of public opinion.[1]

[1]See Coeur d'Alene Consolidated & Mining Co. *v.* Miners' Union, 1892, 51 Fed. 260, 267.

The following extract from the opinion of the court in Union Pacific Railway Co. *v.* Ruef, 1902, 120 Fed. 102, seems to outline the doctrines generally prevailing in the majority of the jurisdictions in the United States:

"I believe, and that without a doubt, that, in so far as propositions are involved in this case, the law is as follows: (1) The defendants acted within their right when they went out on a strike. Whether with good cause, or without any cause or reason, they had the right to quit work for the Union Pacific Railroad Company, and their reasons for quitting work were reasons they need not give to any one. And that they all went out in a body, by agreement or preconcerted arrangement, does not militate against them or affect this case in any way. (2) Such rights are reciprocal, and the company had the right to discharge any or all of the defendants, with or without cause, and it cannot be inquired into as to what the cause was. (3) It is immaterial whether the defendants are not now in the service of the company because of a strike or a lockout. (4) The defendants have the right to combine and work together in whatsoever way they believe will increase their earnings, shorten their hours, lessen their labor or better their condition, and it is for them, and they only, to say whether they will work by the day or by piece work. All such is part of their liberty. And they can so conclude as individuals, or as organizations, or as unions. (5) And the right is also reciprocal. The railroad company has the right to have its work done by the premium or piece system, without molestation or interference by defendants or others. This is liberty for the company, and the company alone has the right to

determine as to that matter. (6) When the defendants went on a strike, or when put out on a lockout, their relations with the company were at an end; they were no longer employes of the company; and the places they once occupied in the shops were no longer their places, and never can be again, excepting by mutual agreement between the defendants and the company. (7) No one of the defendants can be compelled by any law, or by any order of any court, to again work for the company on any terms or under any conditions. (8) The company cannot be compelled to employ again any of the defendants, or any other person, by any law, or by any order of any court, on any terms, or under any conditions. (9) Each, all, and every of the foregoing matters between the company and the defendants are precisely the same, whether applied to the company or to the defendants. (10) The company has the right to employ others to take the places once filled by defendants; and in employing others the defendants are not to be consulted, and it is of no lawful concern to them, and they can make no lawful complaint by reason thereof. And it makes no difference whether such new employes are citizens of Omaha or of some other city or State. A citizen of Chicago or from any State in the Union, has the same rights as to work in Omaha as has a citizen of Omaha. (11) Defendants have the right to argue or discuss with the new employes the question whether the new employes should work for the company. They have the right to persuade them if they can. But in presenting the matter they have no right to use force or violence. They have no right to terrorize or intimidate the new employes. The new employes have the right to come and go as they please, without fear or molestation, and without being compelled to discuss this or any other question, and without being guarded or picketed; and persistent and continued and objectionable persuasion by numbers is of itself intimidating and not allowable. (12) Picketing in proximity to the shops or elsewhere on the streets of the city, if in fact it annoys or intimidates the new employes, is not allowable. The streets are for public use, and the new employe has the same right, neither more nor less, to go back and forth, freely and without molestation, and without being harassed by so-called arguments, and without being picketed, as has a defendant or other person. In short, the rights of all parties are one and the same."

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